92-283

No. _____

Supreme Court, U.S.
F I L E D
AUG 11 1992
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RONALD L. DIXON AND
DONALD J. NAEGELE,
PETITIONERS,

VERSUS

OGDEN NEWSPAPERS, INC.,
A CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI (APPENDIX SEPARATE)

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QUESTIONS PRESENTED

1. Did two news articles written by the respondent's news reporter, Warren Bays, and published in the respondent's newspaper on May 3, 1983, which purported to report and quote accurately the substance and highlights of George Stefanow's testimony in his trial on May 2, 1983, for allegedly making a telephone threat to a rookie police officer who had used Stefanow's name to gain admittance to a reputed house of prostitution in a vice raid, imply defamatory assertions about the petitioners, then policemen, which were sufficiently factual to be proven false, where Stefanow testified repeatedly that he discussed the police raid with the petitioners sometime after the raid, where the news articles omitted any reference to the time frame of the discussions, attributed to Stefanow fabricated quotations of having been "alerted" about the rookie officer and of using the petitioners as "sources" of information, and referred to past and present published concerns expressed by the police chief, then a political adversary of Stefanow, over "leaked" information?

a. If so, was the West Virginia Supreme Court of Appeals wrong in concluding that the first-amendment considerations

required it and the trial court to independently review and evaluate the news articles and to find as a matter of constitutional law that the articles, and any connotations reasonably flowing from them, were not defamatory to the petitioners, despite the jury's finding to the contrary?

b. If so, did the West Virginia Supreme Court of Appeals instead actually conduct an independent evaluation of whether or not the alleged defamatory implications were sufficiently factual to be proven false (confusing it with the issue of a defamatory meaning) and correctly find as a matter of constitutional law that the articles, and any defamatory connotations reasonably flowing from them, could not be proven false, despite the jury's finding to the contrary?

2. Was the West Virginia Supreme Court of Appeals correct in finding that the petitioners' evidence of actual malice on the part of the respondent's reporter, Warren Bays, was not clear and convincing as a matter of constitutional law, despite the jury's finding to the contrary?

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I.

OPINION BELOW, JURISDICTION FOR REVIEW, AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Opinion Below

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered on February 27, 1992, by which that court reversed, on appeal, the judgment of the Circuit Court of Ohio County, West Virginia, which had awarded to each of the petitioners, upon jury verdicts in their favor, compensatory damages in the consolidated trial of their separate civil actions for libel.

The opinion of the West Virginia Supreme Court of Appeals which was delivered in support of its judgment of reversal appears in the separate Appendix to this Petition, beginning at page A-5 thereof. The opinion has not yet been printed in

the official West Virginia reports, but now appears in volume 416 of West's South Eastern Reporter (Second Series), commencing at page 237 (416 S.E.2d 237).

B. Jurisdiction for Review

The judgment of the West Virginia Supreme Court of Appeals sought to be reviewed was, as noted above, entered on February 27, 1992. (App., p. A-3.) The petitioners' petition for rehearing, timely filed, was denied by the West Virginia Supreme Court of Appeals by order entered on May 13, 1992. (App., p. A-1.)

This Petition for a writ of certiorari is filed within ninety days from May 13, 1992, and jurisdiction to review the judgment of the West Virginia Supreme Court of Appeals by writ of certiorari is conferred on this Court by title 28, section 1257(a), of the United States Code.

C. Constitutional Provisions Involved

Portions of the first and fourteenth amendments to the United States Constitution are involved in this case. The first amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

And the fourteenth amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II.

STATEMENT OF THE CASE

A. Synopsis of Substantive Facts

The petitioners, Ronald L. Dixon and Donald J. Naegele, commenced separate libel actions in June, 1983, in the Circuit Court of Ohio County, West Virginia, against Ogden Newspapers, Inc., a corporation based in Wheeling, West Virginia, which owns and publishes at least fifteen newspapers in several states, including The Intelligencer. Dixon and Naegele, then veteran policemen of the City of Wheeling, complained of two separate news articles (App., pp. A-144 and A-150) which appeared on May 3, 1983, in The Intelligencer, a morning newspaper published in Wheeling and circulated throughout the Northern Panhandle of West Virginia and surrounding areas of eastern Ohio and western Pennsylvania. Both of the news articles were written by veteran Intelligencer

reporter Warren Bays and purported to report the highlights and substance of the testimony of George Stefanow, who, in his trial in the Magistrate Court of Ohio County, West Virginia, on the preceding day, had been acquitted by a jury of the alleged misdemeanor of threatening Robert Heldreth, a policeman, over the telephone on July 17, 1982.

Heldreth was a rookie Wheeling policeman when, in a police vice raid on July 15, 1982, he reportedly used the names of Stefanow and another gentleman to gain admission to the "Green Door," a reputed house of prostitution located in the section of Wheeling known as Center Wheeling. Stefanow, an outspoken critic of the uppermost echelon of the Wheeling Police Bureau and then a candidate for election to the Wheeling City Council, when told that his name had been used in the raid, became upset over the matter and eventually

telephoned Heldreth to find out who had instructed him to use Stefanow's name. As a result of the telephone call, Stefanow was charged with and tried for allegedly threatening Heldreth by telephone.

In the course of the prosecutor's cross-examination of Stefanow on May 2, 1983, Stefanow was asked to reveal the names of the persons, particularly policemen, with whom he had discussed the raid and Heldreth's participation in it between the time of the raid on July 15, 1982, and the time of his telephone call to Heldreth on July 17, 1982; and Stefanow identified, among others, Dixon, who was a police sergeant, and Naegele, who was Stefanow's brother-in-law and a police patrolman. The questions asked of Stefanow and the answers given by Stefanow were quite clear concerning the post-raid time frame; and the relevant questions and answers,

taken from the transcript[1] of Stefanow's testimony (App., p. A-85), are quoted at a later juncture for the purpose of demonstrating just how clear they were.

Needless to say, the news articles of May 3, 1983, written by reporter Warren Bays, who attended the day-long trial and personally listened to Stefanow's testimony, omitted any reference to the time frame of Stefanow's discussions about the vice raid with officers Dixon and Naegele. With the addition of journalistic garnish in the form of fabricated quotations attributed to Stefanow, in the form of specific reminders of Bays' earlier

[1]The Magistrate Court of Ohio County, West Virginia, is not a court of record. However, because of the "notoriety" associated with the misdemeanor charge against Stefanow, Ohio County Assistant Prosecuting Attorney A. Dana Kahle, who tried the case for the State, insisted upon having a court reporter to ensure that no witnesses, particularly Stefanow, would be misquoted. (Transcript of libel trial, pp. 122-23.)

Intelligencer articles about dissension within the Wheeling Police Bureau and the police chief's professed concern over frustrated police vice raids, and in the form of an elicited promise of the police chief to study Stefanow's testimony to determine "if official police business had been leaked out," the news articles of May 3, 1983, contended Dixon and Naegele, clearly implied that they had been divulging sensitive police information to underworld figures for corrupt motives. The connotations were false, they maintained. The offensive passages of the two news articles of May 3, 1983, are reproduced at a later point for the purpose of demonstrating precisely how misleading the articles were.

B. Synopsis of Procedural Facts

In each of the libel cases, the defendant, Ogden Newspapers, Inc., filed identical motions under Rule 12(b)(6) of

the West Virginia Rules of Civil Procedure, contending therein, among other things, that Ogden "did not publish any libelous or defamatory matter pertaining to . . ." Dixon and Naegele, that the "language" of the published articles "does not constitute . . . a libel nor is it . . . defamatory," and that the common-law fair-report privilege and the constitutionally-based privilege of neutral reportage were applicable. (App., p. A-80.) The trial court first ruled on the motion in the Naegele case and, treating it as a motion for summary judgment, considered, among other things, the transcript of Stefanow's 1983 trial testimony. (App., p. A-85.) By a combined written opinion and order entered on February 28, 1984, the trial court denied the motion. (App., p. A-72.)

Immediately following the trial court's denial of the motion, Ogden petitioned the West Virginia Supreme Court of

Appeals for a writ of prohibition to prohibit the trial court from proceeding further in the Naegele case, alleging therein that the chilling effect on Ogden's first-amendment rights by the mere pendency and prosecution of Naegele's libel action warranted application of the extraordinary remedy because the news articles were substantially true, were not defamatory, and were privileged publications. The West Virginia high court refused, by a vote of three-to-two, to issue a rule to show cause. Thereafter, the trial court, on January 28, 1985, denied Ogden's motion for summary judgment in the Dixon case, expressly adopting the reasons set forth in the trial court's combined opinion and order rendered earlier in the Naegele case.

The two cases then were consolidated for the purposes of discovery and trial, and eventually were tried on October 26,

October 27, and October 31, 1988. The trial court denied Ogden's motion for a directed verdict at the close of the plaintiffs' case in chief and, again, after all of the evidence had been presented. Dixon and Naegele conceded that they were public officials, and so the jury was fully instructed on Dixon and Naegele's heavy burden of proving, by clear and convincing evidence, actual malice on the part of Bays, for whose acts and conduct Ogden concededly was responsible. Because the alleged defamatory falsehood was one of innuendo, the trial court also instructed the jury that Dixon and Naegele had the burden to prove, by clear and convincing evidence, that Bays wrote and caused publication of the two news articles "with actual knowledge" or "with a high degree of awareness that the conclusions to be drawn from the articles were false and that those false conclusions

would logically follow from the publication." The trial court, of course, instructed the jury as to the issue of a defamatory meaning and the issue of falsity, and as to the plaintiffs' burden of proving each by, at minimum, a preponderance of the evidence.

The six-person jury returned verdicts which awarded to each plaintiff compensatory damages of $250,000 and (under an instruction permitting punitive damages only where and to the extent that compensatory damages are insufficient to dissuade malicious libel in the future) punitive damages of $25,000; and the trial court accordingly entered judgment in favor of Dixon and Naegele on November 10, 1988. (App., p. A-69.) Ogden timely filed its motion for judgment notwithstanding the jury verdicts or, in the alternative, for a new trial, alleging a multitude of grounds, most of which were

constitutionally based. (App., p. A-63.) Except for disallowance of the jury's awards of punitive damages,[2] the trial court denied Ogden's motion by order entered on March 9, 1989. (App., p. A-59.)

On appeal to the West Virginia Supreme Court of Appeals, the judgment of the Circuit Court of Ohio County, West Virginia, was reversed. (App., p. A-3.) The West Virginia high court cited as its reasons for the reversal its conclusions, arrived at independently through the enhanced appellate review required by the

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[2]While counsel for Dixon and Naegele disagrees with the conclusion reached in Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674, cert. denied, 423 U.S. 882 (1975), and applied by the trial court, that the first amendment restricts awards of punitive damages, he did not cross-assign error on appeal to the disallowance of punitive damages because the degree of culpability required of Ogden's management for the imposition of punitive damages against Ogden was not present in this case. See Restatement (Second) of Torts § 909 (1977).

first amendment to the United States Constitution, that the two news articles of May 3, 1983, together with any innuendo reasonably flowing from them, were not defamatory as a matter of law, and that Dixon and Naegele had failed to prove actual malice on the part of Bays with convincing clarity. (App., p. A-5.) The petition of Dixon and Naegele for rehearing and re-argument (App., p. A-41) was denied by the West Virginia Supreme Court of Appeals by order entered on May 13, 1992 (App., p. A-1).

C. Background Events and Climate

Before examining the relevant portions of Stefanow's 1983 trial testimony and comparing them to the offensive passages of the news articles of May 3, 1983, it is first necessary to explain the background events which occurred in the Wheeling area in the late 1970's and the early 1980's

and to describe the political climate of the time—for even in Wheeling, West Virginia, intense coverage by a newspaper of the trial of a person accused of a minor infraction is a rarity of sorts.

In 1972, George Stefanow retired from the United States Navy as a much decorated officer after thirty years of service, including service in combat zones during each of three wars. He returned with his wife to his hometown of Wheeling, West Virginia, in 1972, and settled in the Center Wheeling area in 1977, where he had been reared as a child and a young man. He acquired and operated a tavern in Center Wheeling, and he and his wife, Charlotte, acquired and operated a restaurant and a gift shop in the same area. Stefanow was appalled by the widespread and open heterosexual and homosexual prostitution in the Center Wheeling area, which, because of such prostitution,

had become known in some circles as "the meat rack." He urged the Wheeling Police Bureau to take action to remove the prostitution problem and, as well, to eliminate drug trafficking in the area. His pleas were to no avail, Stefanow maintained.

Stefanow then embarked on his own investigation into the prostitution and drug-trafficking problems. Stefanow claimed that, as a result of his investigation, he learned that the operators of most houses of prostitution in the area paid protection money to the police, and those who did not pay were raided frequently by the Wheeling Police Bureau's vice squad. Furthermore, Stefanow contended that members of the vice squad often kept for themselves money, drugs, and other evidence seized in vice raids, and contended that the Chief of the Wheeling Police Bureau, Edward L. Weith,

Jr., and the Bureau's Chief of Detectives, Joseph S. Davis, had suppressed and obstructed the prosecution of their sons and the relatives of other high-ranking police officers for various felonies and misdemeanors, including drug trafficking. Stefanow voiced his accusations to various local, state, and federal authorities, including the Wheeling City Council. He also sought a seat on the Wheeling City Council in 1982, promising to electors that he would end corruption and illegal practices within the Wheeling Police Bureau. Stefanow's accusations were reported by the news media throughout the Wheeling area. In return, members of the Wheeling vice squad, and other high-ranking police officers, publicly insinuated that Stefanow was connected to organized crime and that his campaign to cleanse the Wheeling Police Bureau of al-

leged corruption was actually an effort to disrupt the Wheeling Police Bureau's crime-fighting activities. In 1982, suits and countersuits were brought by members of the Police Bureau against Stefanow, and vice versa, for alleged defamations and alleged instances of malicious abuse of civil and criminal process. Moreover, warrants for alleged petit offenses flew back and forth between the police and Stefanow. All of this was eagerly and frequently reported by the local news media, even though nothing ultimately came of any of the suits and charges.

Some members of the Wheeling Police Bureau, including Dixon, had earlier investigated some of the matters about which Stefanow later complained and believed that some of the matters had substance. Dixon and other officers had been reprimanded and even demoted for their earlier efforts. They had been

told by Chief of Police Edward L. Weith, Jr., and Chief of Detectives Joseph S. Davis that "the police department takes care of their own dirty laundry" and that the officers were expected to "go along with the program." (Transcript of libel trial, pp. 266-67.) Later, when Dixon and other members of the Wheeling Police Bureau sought to process the complaints of victims of alleged thefts by members of the vice squad, they again were reprimanded. As a consequence, the allegiance of a substantial number of officers, including Dixon and Naegele, to the chief of police and the chief of detectives, who together ran or orchestrated the Bureau, evaporated, and morale within the Bureau deteriorated.

Bays, then an admittedly close personal friend and daily visitor of the chief of detectives, had been reporting the dissension within the Police Bureau in

a series of articles which had appeared in The Intelligencer, having described the problem as a "rift" or "split" in the ranks. In a story authored by Bays and appearing on page one of The Intelligencer on March 12, 1983, Bays reported that the "split in the ranks of the Wheeling Bureau of Police appeared to grow wider . . ." when a police officer, who supposedly witnessed a night-club altercation involving the son of the chief of detectives, refused to testify in the Magistrate Court of Ohio County, West Virginia, on behalf of Dixon and William S. McCormick, a former police officer. (App., p. A-125.) That article (admitted into evidence) bore the headline "RIFT IN POLICE RANKS APPEARS TO WIDEN."

Four days later, on March 16, 1983, another page-one story written by Bays appeared in The Intelligencer under the

headline "WEITH FAULTS 'OUTSIDE INFLUENCE'." (App., p. A-136.) Practically the entire article (admitted into evidence) consisted of Chief Weith's exculpatory comments about the cause and reasons for the dissension noted in the series of earlier articles, particularly the article of March 12, 1983. Weith, in the article of March 16, 1983, blamed the dissension on outside influences "who," he said, wanted "to open things up" for more vice and crime in Wheeling and "who" wanted a new chief of police in order to accomplish the goal. Those "five or six or seven" members of the Police Bureau who wanted a new chief of police, Weith opined, sided with the outside influences and wanted more illegal activities too, noting that police undercover work and vice raids had been frustrated because "information" was being "leaked" to outsiders by disgruntled officers responsible for the dissension:

> He [Weith] said he feels certain some police department information has been "leaked" to outsiders.
>
> "We've sent new men out on undercover work, and on assigned raids, and their identity has been known by the time they left the building," Weith said.
>
> "We can't keep the identity of a new officer secret. Their description is given to certain people. . . ."
>
> Trying to prove who is responsible for this "is next to impossible," Weith said. "But we have pretty good ideas who has been responsible."

The "outside influence," "outside influences," and "outsiders" to which or whom Weith referred in his published comments included, or were intended to mean, George Stefanow, testified Weith (Transcript, pp. 385, 394), suggested Bays (Transcript, pp. 592-93, 604), and suggested Assistant Prosecuting Attorney A. Dana Kahle (Transcript, pp. 133-34), who had prosecuted Stefanow in the 1983 telephone-threat

trial.

Thus, at the time of the publication on May 3, 1983, of the two news accounts of Stefanow's misdemeanor trial and testimony, readers of The Intelligencer already had been led to believe that sensitive and confidential police "information" was being "leaked" to the underworld by a small number of disgruntled, criminally-motivated policemen who were in league with the underworld, and that Stefanow probably was a member of the underworld. That the reading public had been led to those conclusions is evidenced by the testimony of Thomas Briley, who had been executive editor of The Intelligencer at the time, and by the testimony of Bays. Both Briley (Transcript, pp. 498-99, 503) and Bays (Transcript, corrected p. 566 through p. 567) testified that Stefanow's 1983 trial testimony was newsworthy and warranted separate space be-

cause Stefanow's "informants" on the police force had been revealed in his testimony. There was a "need," testified Bays, for two articles and for obtaining and publishing the comments of Chief Weith about Stefanow's identification of his "informants" on the police force, as a follow-up to the earlier articles written by Bays, particularly the article published on March 16, 1983. (Transcript, pp. 557-58, 573, 580, 599.)

D. A Comparison of Stefanow's Testimony to Bays' News Accounts

A comparison now seems appropriate of Stefanow's actual testimony adduced during his misdemeanor trial on May 2, 1983, to Bays' version of the substance and highlights of that testimony which appeared in The Intelligencer on May 3, 1983.

Stefanow's attorney[3] called Stefanow as a witness in his own defense at trial.

Although much haggling between Stefanow's attorney and the State's attorney took place throughout direct examination of Stefanow, the questions and answers, for the most part, related to the alleged telephone threat. On cross-examination, however, much testimony was elicited that obviously was irrelevant and immaterial to the issues then being tried.[4] During cross-examination of Stefanow (App., pp. A-105 through A-122), the fol-

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[3]Stefanow's attorney, William R. Metzner, also is counsel for Dixon and Naegele in their libel suits. However, William R. Metzner did not become counsel for Dixon and Naegele until 1987, when their attorney, Joseph W. Bonie, of Weirton, West Virginia, left West Virginia and withdrew as their counsel in the libel cases.

[4]Stefanow's attorney allowed the irrelevant and immaterial testimony because he did not want it to appear to the jury that anything was being held back or concealed by Stefanow, since the attorney's evaluation of the jurors at that point indicated that the case was in a posture to be won.

lowing questions were asked and the following answers were given:

> Q. Mr. Stefanow, when did you first become aware of the length of time Officer Heldreth had been on the police force?
>
> A. When I checked into it with the Clerk's Office.
>
> * * * *
>
> Q. [A]fter Officer Heldreth swore out the warrant?
>
> A. It was after that. Yes, sir.
>
> * * * *
>
> Q. And you testified here that you were upset because he had only been on the force two days and what did he know about law; isn't that correct, sir?
>
> A. Because other police officers told me how long he had been on the police force.
>
> Q. Before you called him [Heldreth] other police officers told you that?
>
> A. Oh, yes. I have information from other police officers.
>
> Q. You had information from

other officers between the time the residence of 2126½ Market Street was raided and the 17th of July, two days, from other police officers; is that what you are telling us?

A. Yes. I am.

Q. Would you tell us the names of those police officers that gave you that information?

A. I will not because it would tend to incriminate them.

Q. Well, if it would tend to incriminate them...

A. The police officers.

Q. I don't believe you have the privilege...

A. Well, I have that privilege.

* * * *

(Whereupon, Mr. Metzner and Mr. Stefanow confer.)

Q. (By Mr. Kahle) Would you tell us the names of the police officers that informed you of the raid? Let me put it a little closer in time so there is no misunderstanding.

Who informed you of the raid at 2126½ Market Street or Main Street?

A. Uh-huh.

Q. Between the time of the raid and the time you called Officer Heldreth. Tell us the names of those officers.

A. Well, my brother-in-law was one.

Q. Who is that?

A. Patrolman Naegele.

Q. Patrolman Naegele told you of the raid?

A. Yeah. Later.

Q. I am talking about between the 15th, when the raid occurred and the 17th when you called this man [Heldreth]. That's the ones you said...

A. No. No. I got the call directly from the people that owned the building.

Q. You got the call directly from the people that owned the building?

A. That is right.

* * * *

Q. That is Lucille Riggi?

A. Right.

Q. And what time did she call?

A. I don't have no idea what time of the day it was.

Q. Well, was it the next day or was it the night of the raid?

A. It was about the next day.

* * * *

Q. Then, it wasn't police officers that told you; was it?

A. No. Not at that time. But, I discussed it later with police officers.

Q. Who were the police officers you discussed it with?

* * * *

A. Donald Naegele.

Q. Any other police officers?

A. Sergeant Dixon.

Q. Sergeant Dixon. When did you discuss it with Sergeant Dixon?

A. I don't recall the exact date. It was after the raid.

Q. How long after the raid?

A. I have no idea. It might have been a day, two days, three days.

Q. Shortly after the raid? Within a week?

A. Within a week.

* * * *

Q. (By Mr. Kahle) Then, your sole information was from Lucille Riggi?

A. Now, I would like to add another thing. The next day when I found out about it, okay, when my name was used, when I got the phone call, I went to the City Building and I approached Chief Weith and he called Detective Joe Davis in with him.

I asked Joe Davis why when they made a raid down there, why they would have somebody use my name and Joe Davis informed me we use any ploy we can, anybody's name or any ploy we can to get into a house of prostitution.

* * * *

> And all it got—my answer was from the Chief and Joe Davis was just a smirk and a smile. In other words, they wasn't going to do anything about it. * * *

Counsel for Dixon and Naegele, of course, inserted the underscores of words and lines in the questions and answers quoted above. Those words and lines, maintain Dixon and Naegele, made it perfectly clear to those who heard Stefanow's testimony that all of Stefanow's discussions with Dixon, Naegele, and others about the vice raid of July 15, 1982, had been after the occurrence of the raid and not before.

On the morning of May 3, 1983, a news article written by Bays appeared on the front page of The Intelligencer under the headline "STEFANOW: POLICEMEN SUPPLIED INFORMATION," with the page-three continuation of the article bearing the headline "DATA SOURCE CLAIMED." (App.,

p. A-144.) That news article appeared on the front and third pages of every edition of the newspaper throughout the newspaper's entire area of circulation.

Another news article written by Bays appeared on the first page of the second section of the "city edition" of The Intelligencer, and was entitled "STEFANOW FOUND INNOCENT IN PHONE THREAT." (App., p. A-150.) This article appeared in no other regional edition, and so its circulation was limited to Wheeling and surrounding suburbs.

The lead-in paragraph of the article which bore the headline "STEFANOW: POLICEMEN SUPPLIED INFORMATION" stated:

> Wheeling tavern owner George Stefanow testified Monday that his brother-in-law, Patrolman Donald Naegele, and Sgt. Ronald Dixon of the Wheeling Bureau of Police supplied Stefanow information about a vice raid last summer.

After noting that there had been diffi-

culty in serving subpoenas so that the trial could proceed uninterrupted, and that Stefanow had been found innocent of the alleged telephone threat, the article continued:

> Highlighting testimony was Stefanow, who revealed Naegele and Dixon offered him information about the vice raid on an alleged house of prostitution at 2126½ Main St. last July 15.
>
> Stefanow, however, did not say if the information discussed was official police business.
>
> Police Chief Edward Weith Monday night said he would "study the testimony" given, to determine if any "official police business had been leaked out."
>
> In the past, Weith has charged that outside influences had been causing a split in the ranks of the police department and that officers discussing "police business" had been creating problems within the ranks.
>
> The chief said Stefanow's testimony Monday does not in itself indicate any wrongdoing.

> "We would have to determine exactly what was discussed and see if official police business had been leaked out."

The article which carried the headline "STEFANOW FOUND INNOCENT IN PHONE THREAT" contained the following passages relative to Stefanow's testimony. While a careful comparison of Stefanow's actual testimony to the quotations attributed to Stefanow in the article reveals that not one of the quotations was accurate, counsel for Dixon and Naegele has underscored only those fabrications which, he believes, materially altered the meaning of Stefanow's testimony when considered in conjunction with the critical omission of any reference to the clearly expressed post-raid time frame during which Stefanow's discussions with Dixon, Naegele, and others had taken place:

> Defense testimony presented by Stefanow indicated that he discussed the prostitution

raid on the Green Door with at least two police officers, and he testified that both had offered information to him.

Under questioning by Ohio County Assistant Prosecutor A. Dana Kahle, Stefanow identified his informants on the police force as "my brother-in-law Don Naegele and Sgt. (Ronald) Dixon."

Stefanow had at first refused to identify his "sources" on the police force "because it might incriminate the officers," but after consulting with his attorney, William Metzner, he agreed to testify about information given him concerning the vice raid in Center Wheeling.

"I discussed it with Don Naegele and Sgt. Dixon," Stefanow said. In answer to a question from Kahle, Stefanow said he "sometimes asks" the two police officers questions "and they give me information."

However, there was no testimony as to exactly what was discussed between Stefanow and the police officers. Stefanow said it was common knowledge that a "rookie" is used on vice raids and that he had "obtained information" about Heldreth before he had

ever met the new policeman.

"Police officers told me he had only been on the force for two days," Stefanow told the court. He further said "I had been alerted" about Heldreth.

He identified Lucille Riggi, who has been cited by police for operating an alleged house of prostitution, as one person having given him information on the new officer and the vice raid.

Stefanow said Mrs. Riggi told him that the raid was successful because the rookie policeman gained entrance to the alleged house by using Stefanow's name.

In reviewing the passages quoted above, particularly the last four, one should keep in mind that, in the presence of Bays, Stefanow clearly testified in his misdemeanor trial on May 2, 1983, on direct examination, that he "never met" (App., p. A-88) and "never knew" and "had never seen" (App., p. A-104) Officer Heldreth until after the vice raid of July 15, 1982, and, on cross-examination,

that "I never heard of the man [Heldreth]" and "I wanted to find out who he was because I had never heard of him before" the vice raid (App., p. A-107).

It is interesting to note that Warren Bays never was asked, on direct examination by Ogden's attorney at Dixon and Naegele's 1988 libel trial, whether or not he knew, while writing the news articles of May 3, 1983, that Stefanow had testified that his discussions with Dixon, Naegele, and others had taken place only after the vice raid. All that was asked of Bays about Stefanow's discussions of the vice raid were the questions, "And did you check the story [news articles] against your notes for accuracy?" and Was any such check for accuracy "to the best of your ability at that time?", to each of which Bays answered yes. (Transcript of libel trial, p. 558.) Asked why he had not spoken with

the court reporter before writing the news articles, Bays replied that "in our profession" it is "common knowledge" that "I could be charged with tampering or attempting to tamper with it [the transcript]." (Transcript, p. 539.)

During cross-examination, Bays steadfastly maintained that "the story [each news article] is complete as it appears" despite the omission from each article of any mention of the post-raid time frame of Stefanow's discussions about the vice raid. (Transcript, p. 624.) After awhile, however, Bays professed that, although he had been able to hear Stefanow's testimony from his vantage point in the magistrate courtroom (Transcript, p. 612) and had, in fact, heard it (Transcript, p. 614), he nevertheless had been confused[5] about the time

---

[5]In the written opinion of the West

frame of Stefanow's discussions with Dixon, Naegele, and others (Transcript, pp. 622, 623). Somewhat perplexed by a series of seemingly evasive answers from Bays, counsel for Dixon and Naegele later made the following inquiry of Bays, to which Bays responded with the following answer (Transcript, p. 625; emphasis added):

> Q. Well, I asked you for your state of mind at the date of Stefanow's trial when you heard his testimony. Now, you said it was cloudy and uncertain and/or confusing as to

---

Virginia Supreme Court of Appeals (App., p. A-5) delivered by Justice Brotherton on February 27, 1992, in this libel case, Bays was erroneously and improperly quoted as having testified at trial that "I think it [the post-raid time frame of Stefanow's discussions] was unclear to an awful lot of people" (App., p. A-32). The quotation is from page 31 of the pre-trial deposition of Bays taken on June 27, 1988, which was never introduced or read into evidence. No such statement was made by Bays at trial. If it had been, an objection certainly would have been interposed and upheld.

the time frame to which Mr. Stefanow referred. You knew that at the time. Now, is that your answer or do you want to amend that?

A. No, I am not going to amend it. That's my answer.

In the presentation of their case in chief, Dixon and Naegele offered their own explanation for the discrepancies between Stefanow's 1983 trial testimony and Bays' news accounts of the testimony. It was not merely Bays' professed confusion, or even conscious recklessness, which had given rise to the discrepancies. Instead, they contended that the discrepancies had been deliberate and offered the testimony of Bernard Watson, a friend and former employee of Stefanow, and the testimony of Charlotte Stefanow, Stefanow's wife, in partial support of their position.

Mrs. Stefanow first testified that she clearly had heard and understood Stefanow's 1983 trial testimony from her

position in the magistrate courtroom near or next to Bays, and that there had been no distractions while Stefanow was testifying. (Transcript, pp. 348-50.) She further testified that just after the magistrate-court jury had returned its verdict acquitting Stefanow of the telephone-threat charge, she observed Lt. Joseph S. Davis, Bays' close friend, "pacing back and forth" near the courtroom door and noticed that Davis "was rather red in the face." (Transcript, p. 357.) Davis held the courtroom door open for Bays, she continued, and Davis and Bays exited the courtroom together, conversing as they passed Watson, who was standing near the door. (Transcript, p. 357-59.) Watson testified that as Davis and Bays passed him, Davis was using "nasty language" and "snarled" to Bays over his shoulder, "You get these MF's [using the unabbreviated epithet]!"

(Transcript, pp. 457-58.) In response to that remark, continued Watson, Bays "sort of grinned and nodded his head like and they walked on by." (Transcript, p. 458.)

Ogden chose not to cross-examine Watson.

III.

ARGUMENT

A. False and Defamatory Connotation

According to the written opinion of the West Virginia Supreme Court of Appeals (App., p. A-5) published in this libel case, the court reversed the judgment of the trial court rendered in favor of Dixon and Naegele apparently for two reasons: (1) the articles written by Bays, together with any resulting innuendo, were not defamatory as a matter of law, and (2) Dixon and Naegele failed to prove actual malice by clear and convincing evidence. The first reason for reversal poses some difficulty to the petitioners because the court's explanation of the matter is rather fragmentary and sparse.

To illustrate, the court stated the following with respect to the first reason for reversal:

The newspaper argues that the plaintiffs failed, as a matter of law, to adequately demonstrate either the falsity of the story or that the story was published with the actual malice required by New York Times Co. v. Sullivan . . . and its progeny. We agree that the constitutional evidentiary requirement was not met in this case, and for the reasons set forth below, we reverse the judgment of the Circuit Court of Ohio County.

* * * *

In its defense, the newspaper offers that the contents of the two stories were true and accurate. . . . The newspaper submits that when the context [content] of an article is substantially true, innuendo alone is insufficient to support a public official's claim of libel. Further, because First Amendment defenses are involved, a trial court must make an independent determination of whether an article is capable of a defamatory connotation . . . .

* * * *

"A court must decide initially whether as a matter of law the challenged statements in a defamation action are

> capable of a defamatory meaning." Syllabus point 6, Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778 (1986).
>
> * * * *
>
> The appellant argues that the articles written by Bays, together with any innuendo that could reasonably flow from their omission of the fact that the vice raid information was not communicated to George Stefanow until after the raid, are not defamatory as a matter of law and the court erred in failing to make this preliminary finding. We agree.

After the last paragraph quoted above (App., p. A-24), the court quickly changed the topic to the issue of actual malice, which it pursued for the remainder of its written opinion (App., pp. A-24 through A-40).

The court's notion that the issue of a defamatory meaning or connotation is a matter of constitutional law to be decided independently by the court comes largely from the court's decision in Long v. Egnor,

176 W.Va. 628, 346 S.E.2d 778 (1986). In the Long case, the West Virginia Supreme Court of Appeals awarded a writ of prohibition to a school employees' union to prohibit a libel suit, brought by members of a county board of education, from proceeding further after the trial court denied the union's motion to dismiss the suit. In the libel suit, the board members had complained that they were libeled by a union memorandum to union members stating that an unidentified board member would "systematically deny all grievances" filed by union members in the future.

The West Virginia high court in Long reaffirmed the general rule summarized in syllabus point 3 of Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977), that ordinarily a

> "trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears

> beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Long v. Egnor, supra, 346 S.E.2d at 782.

However, said the court, "we believe that where First Amendment rights are implicated, courts have applied a stricter standard in judging the sufficiency of a complaint." Ibid. (Emphasis added.) The court then went on to formulate the rule, expressed in syllabus point 6, that "a [trial] court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning."

In formulating the rule, the West Virginia high court relied heavily on New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny, particularly Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970), and Garrison v. Louisiana, 379 U.S. 64 (1964),

which, the court concluded, make it

> "clear that the United States Supreme Court conducts an independent review of the evidence in libel cases to determine as a matter of constitutional law whether the statement was libelous or was made with actual malice." Long v. Egnor, supra, 346 S.E. 2d at 784. (Emphasis added.)

The court in Long then reiterated its earlier conclusion in Mauck v. City of Martinsburg, 167 W.Va. 332, 280 S.E.2d 216, 220 (1981), that under New York Times Co. v. Sullivan, supra, "whenever there is a First Amendment defense to actions under state law, the state court [including the trial court] is required to be a judge of both the facts and the law." Long v. Egnor, supra, 346 S.E.2d at 787. Thus, the duty of independent review of "constitutional facts" as discussed and refined by this Court in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), has, in West

Virginia, been passed in large measure to trial judges to perform initially by reason of the rule formulated in Long.[6]

It is submitted that the issue of whether or not a particular statement is defamatory or carries a defamatory connotation has not yet been placed under the protective umbrella of the first amendment by the United States Supreme Court, and that the West Virginia Supreme Court of Appeals confused, in Long, the issue of a defamatory meaning with the issue of falsity. This Court said in Milkovich v.

---

[6]It is perhaps in unexpressed recognition of the idea that a jury should have some function that the West Virginia Supreme Court of Appeals altered its conclusion in the body of the Long opinion that "the critical issue that must be decided by a [trial] court initially is whether the challenged statements are defamatory," Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778, 787 (1986), by stating in syllabus point 6 that such critical issue is whether as a matter of law the challenged statements "are capable of a defamatory meaning." (Emphasis added.)

Lorain Journal Co., 110 S.Ct. 2695, 2706 (1990), that the line of cases of Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, supra; Letter Carriers v. Austin, 418 U.S. 264 (1974); and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), stands for the proposition that full first-amendment protection will be afforded to statements, such as rhetorical hyperbole and imaginative expression, which cannot reasonably be interpreted as stating or implying "actual facts" about a person or which are not "sufficiently factual to be susceptible of being proved true or false." In such instances, a libel plaintiff is unable to discharge the burden of proving falsity which has been cast upon him by the first amendment. E.g., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

It is further submitted that the issue of a defamatory meaning or connota-

tion in the case at bar should have been purely a question of West Virginia law, unaffected by first-amendment law, and that the alleged defamatory implications of the news articles published in The Intelligencer on May 3, 1983, were sufficiently factual to be proven false. Thus, the West Virginia Supreme Court of Appeals erred when it held that the news articles, and any connotations reasonably flowing from them, were not defamatory as a matter of law, and should have given to the jury's finding of defamatory implications, inherent in its verdicts for Dixon and Naegele, the same weight on appeal as it would have given if the case had been an ordinary tort case. Ordinarily, a jury's finding or verdict in West Virginia will not be disturbed on appeal unless the evidence plainly and decidedly preponderates against the finding or verdict. E.g., Nationwide Mut. Ins. Co. v.

Conley, 156 W.Va. 391, 194 S.E.2d 170 (1972).

It is finally submitted that if first-amendment considerations did cast upon the West Virginia Supreme Court of Appeals (1) the obligation of conducting independent appellate review and evaluation of the evidence of a defamatory meaning or connotation in the case sub judice, or (2) the obligation of deciding as a matter of law whether or not the news articles of May 3, 1983, were capable of a defamatory meaning or connotation, the court's conclusion in either instance— that the news articles were not defamatory— nevertheless was erroneous as a matter of first-amendment law for the reasons set forth below.

The trial court's charge to the jury included the contentions of Dixon and Naegele that "each of the news articles . . . of May 3, 1983, has a defamatory

or libelous meaning about the plaintiffs, by innuendo, insinuation or implication," and that

> "because the news articles did not mention that information about a police vice raid had been given by the plaintiffs to George Stefanow until sometime after the raid, but not before the raid . . . , readers of the newspaper derived the meaning that the plaintiffs were accused or guilty of misconduct, dishonesty or corruption in their occupations as police officers by divulging or "leaking" sensitive and confidential police information in advance of the raid, and perhaps in advance of other police raids and activities as well."

Dixon and Naegele introduced into evidence at trial the transcript of Stefanow's 1983 trial testimony and the allegedly libelous news articles of May 3, 1983, in which Bays purported to report the substance and highlights of Stefanow's testimony, and asked the jury to compare Stefanow's testimony to the news articles. Furthermore, Dixon and Naegele offered

into evidence the two earlier news articles, written by Bays, which had been published in The Intelligencer on March 12, 1983 ("Rift"), and March 16, 1983 ("Outside Influence"), and offered into evidence the testimony of numerous witnesses to prove the other background events and climate recited earlier in this Petition (pp. 14-24).

At this juncture, it should be noted that Dixon and Naegele revealed at trial the full nature and extent of their discussions with Stefanow concerning the police vice raid of July 15, 1982. In response to Stefanow's inquiry over the telephone within several days after the vice raid, Dixon, who then was at the Police Bureau, told Stefanow that the complainant's name on the prostitution complaint, which had been posted in the Police Bureau for release to the news media and public, was Robert Heldreth.

(Transcript, pp. 162-63.) In response to Stefanow's inquiry over the telephone shortly after Stefanow had talked to Dixon, Naegele, who was then at his home, told Stefanow that he never heard of Heldreth. (Transcript, pp. 309-310.) Dixon and Naegele further testified at trial that they never divulged to anyone outside the Police Bureau, at any time in their careers as police officers, any sensitive police information, or any information about any covert police operation in advance of the operation. (Transcript, pp. 162-65, 212, 312-13.) Their testimony on these points was uncontested. Thus, falsity of the alleged defamatory implications was proven beyond question in two senses: (1) Stefanow testified repeatedly in his 1983 misdemeanor trial that he had not discussed the vice raid of July 15, 1982, with Dixon and Naegele until after the raid, as evidenced by the

transcript of his 1983 testimony (which was stipulated by the parties as accurate); and (2) Dixon and Naegele never "leaked" sensitive police information to Stefanow or anyone else in their careers, as evidenced by their unchallenged testimony.

It is difficult to imagine any news article more fact-laden in the minds of readers than one which purports to report the substance and highlights of a witness' testimony in a judicial proceeding, particularly when the writer frequently employs quotations. Frequent quotations deliver the impression of substantial accuracy and authenticity. Quotations do not convey to the reader the idea that the author is giving only his interpretation of what an inarticulate speaker said. See Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419, 2433-34 (1991). And the more frequently that statements in an article are attributed to a speaker by the

use of quotation marks, the more likely it is that reasonable readers are led to believe that unquoted material attributed to the speaker in the article also is substantially accurate and true and that the entire article is thorough and complete.

The news articles written by Bays, which purport to report the substance and highlights of Stefanow's 1983 trial testimony, set forth many quotations to attribute speech to Stefanow and other persons. The articles therefore suggest substantial truth, substantial accuracy, and completeness. As we have seen in an earlier part of this Petition (pp. 24-37), however, a comparison of Stefanow's testimony to the contents of Bays' news articles reveals inaccurate and fabricated quotations and the omission of a critical fact—the post-raid time frame of Stefanow's discussions with the petitioners about the raid.

Most courts which have considered the matter have recognized that a false, defamatory conclusion arising from substantially true facts in a news story is not actionable by a public official unless there are material facts omitted from the story which, if reported, would have changed the meaning or gist of the story by preventing readers from being misled to the false, defamatory conclusion. If so, the implied conclusion is tantamount to, and on an equal footing with, an explicit statement. See, e.g., Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 477 A.2d 1005 (1984); DeFalco v. Anderson, 209 N.J.Super. 99, 506 A.2d 1280 (App. Div. 1986); Diesen v. Hessburg, 455 N.W.2d 466 (Minn. 1990); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (en banc), cert. denied, 479 U.S. 883 (1986). Until Masson v. New Yorker Magazine, Inc., supra, however, courts

for the most part paid only lip service to the rule.

In Masson, this Court considered six published passages, taken from recorded interviews, in which the public-figure plaintiff had been misquoted, and concluded that five of the six published passages created jury questions as to falsity and actual malice. There, this Court observed that, because of material alterations, "many of the quotations at issue might reasonably be construed to state or imply factual assertions that are both false and defamatory . . . ," Masson, supra at 2433, and concluded that the meaning of one of the plaintiff's recorded statements (treated under the Court's heading "He Had the Wrong Man") was materially altered by the omission, in the quoted passages, of part of what actually had been said, id. at 2437.

B. Actual Malice

In the case of Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678 (1989), this Court (clarifying the interrelationship of the clearly-erroneous standard for review of findings of fact and the constitutionally-based rule of independent appellate review of actual-malice determinations) held that a jury's "credibility determinations are reviewed under the clearly erroneous standard . . ." because the jury has had the opportunity to observe the demeanor of the witnesses. Id., 109 S.Ct. at 2696. This Court, more importantly, made it clear that an appellate court must first conduct a review of the evidence of the underlying facts in dispute to determine whose and what testimony the jury must have rejected on credibility grounds in light of the trial court's instructions

and the jury's answers to any special interrogatories, and then consider what is left along with the undisputed evidence. Ibid.

Moreover, in Harte-Hanks, this Court observed:

> "Although courts must be careful not to place too much reliance on such factors [motive and lack of care], a plaintiff is entitled to prove the defendant's state of mind [actual malice] through circumstantial evidence . . . , and it cannot be said that evidence concerning motive or [lack of] care never bears any relation to the actual malice inquiry." Id., 109 S.Ct. at 2686.

Earlier, in Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674, cert. denied, 423 U.S. 882 (1975), the West Virginia Supreme Court of Appeals, in a case of libel by misleading headlines over substantially true news stories, had recognized that "personal motives on the part of a newspaper, or participation by a

newspaper in a plan or scheme to injure, is . . ." evidence bearing on the actual-malice inquiry. Id., 211 S.E.2d at 688.

Following the Harte-Hanks approach of appellate review, what undisputed facts and circumstances disclosed by the evidence in the case at bar demonstrate cumulatively that the defamatory innuendo (identified in a preceding section) not only was anticipated or intended by Bays, but also was known by Bays to be false or probably false? The answer:

(1) Bays, a "proficient" and "detailed" reporter (Briley, Transcript, p. 510), was present throughout Stefanow's trial and heard and witnessed firsthand the entire testimony of Stefanow, who reiterated and emphasized clearly the fact that his discussions with Dixon and Naegele about the vice raid of July 15, 1982, had taken place after the raid, and yet Bays omitted to report that critical fact.

(2) Charlotte Stefanow, Stefanow's wife, was present throughout Stefanow's testimony, near or next to Bays, and heard and witnessed firsthand the entire testimony of Stefanow, and clearly understood from his testimony that the discussions with Dixon and Naegele had taken place only after the vice raid.

(3) Stefanow, in his 1983 trial testimony, identified by name not only Dixon and Naegele as police officers with whom he had later discussed the raid, but also Weith and Davis (the day after the raid), yet Bays made no reference in the news articles to the discussions with Weith and Davis except by reporting, in the inside article, that Stefanow had discussed the raid "with at least two police officers," naming only Dixon and Naegele. (Emphasis added.)

(4) Stefanow, in his 1983 trial testimony, did not say that any persons were

"sources" of information, did not say that Dixon and Naegele "give me information," and did not say that "I had been alerted" about Heldreth, and yet Bays fictitiously quoted Stefanow as having said those things.

(5) Stefanow, in his 1983 trial testimony, repeatedly said that he had never known or heard of Heldreth until after the vice raid of July 15, 1982, and yet Bays fictitiously quoted Stefanow as having said that "I had been alerted" about Heldreth.

(6) Bays reported that "there was no testimony as to exactly what was discussed between Stefanow and the police officers" (inside article) and that "Stefanow, however, did not say if the information discussed was official police business" (front-page article), and yet Bays (consciously confused, by admission, about the time frame of the discussions)

reminded readers about Chief Weith's earlier published charges that sensitive police information was being "leaked" in advance by criminally-motivated dissidents to frustrate undercover operations and elicited and reported Chief Weith's comments subtly suggesting that Stefanow's testimony implicated Dixon and Naegele in the wrongdoing.

(7) Bays was a close personal friend of police Lt. Joseph Davis for more than twenty-five years and had known Chief Weith as long, and was acutely aware of Stefanow's campaign to cleanse the Wheeling Bureau of Police of alleged corruption and of the consequent ongoing friction between Stefanow and his sympathizers, on the one hand, and Davis, Weith, and their allies, on the other.

(8) Bays devoted the entire front-page news article of March 16, 1983, which bore the headline "WEITH FAULTS 'OUTSIDE

INFLUENCE'," solely to Weith's exculpatory comments about the cause and reasons for the dissension within the Police Bureau, while not attempting to contact anyone else for any competing comments or in-put.

(9) Bays admittedly was (at the least) consciously confused about the post-raid time frame of Stefanow's discussions with Dixon and Naegele and knew that at the time he wrote the news articles of May 3, 1983.

What material facts and circumstances mentioned in the evidence in the case at bar and bearing upon the issue of actual malice were disputed? The answer: Bays denied that he talked to Chief of Detectives Joseph S. Davis at Stefanow's trial and denied that, at the end of the trial, he "grinned" and "nodded" in response to any angry demand of Davis to Bays for Bays to "get" Dixon and Naegele.

That the jury chose to believe the petitioners' witnesses and to reject Bays' testimony in material respects is evidenced by the findings which the jury indicated that it had made when returning its verdict forms awarding punitive damages. Each form instructed the jury that no punitive damages could be awarded unless

> "you find from clear and convincing evidence that [the plaintiff] has proved . . . actual malice and that the articles were published with a deliberate intent to injure [the plaintiff]." (Emphasis added.)

The jury was clearly convinced that, at the least, Bays wrote the news articles with a "high degree of awareness of . . . probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964), or with "serious doubts as to the truth . . . " of the defamatory implications, St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

IV.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the West Virginia Supreme Court of Appeals entered on February 27, 1992.

Respectfully submitted,

William R. Metzner,
Attorney for Petitioners

August 10, 1992

92-243

Supreme Court, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RONALD L. DIXON AND
DONALD J. NAEGELE,
PETITIONERS,

VERSUS

OGDEN NEWSPAPERS, INC.,
A CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of May 1992, the following order was made and entered:

Ronald L. Dixon, Plaintiff Below, Appellee

vs.) No. 19425

Ogden Newspapers, Inc., a corporation, Defendant Below, Appellant

AND

Donald J. Naegele, Plaintiff Below, Appellee

vs.

Ogden Newspapers, Inc., a corporation, Defendant Below, Appellant

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and cer-

tified as heretofore directed.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th day of February, 1992, the following order was made and entered:

Ronald L. Dixon, Plaintiff Below, Appellee

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Ogden Newspapers, Inc., a corporation, Defendant Below, Appellant

AND

Donald J. Naegele, Plaintiff Below, Appellee

vs.

Ogden Newspapers, Inc., a corporation, Defendant Below, Appellant

The Court, having maturely considered the transcript of the record and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in the judgment of the Circuit Court of Ohio County, rendered on the 9th day of

March, 1989. It is therefore considered and ordered by the Court that said judgment be, and the same is hereby, set aside, reversed and annulled, and that the appellant, Ogden Newspapers, Inc., a corporation, do recover of and from the appellees, Ronald L. Dixon and Donald J. Naegele, its costs about the prosecution of its appeal in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Ohio County.

The syllabus of points adjudicated, prefixed to the written opinion aforesaid, prepared by Justice Brotherton, was concurred in by Chief Justice McHugh and Justices Workman, Neely and Miller.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court of Appeals

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1991 Term

No. 19425

RONALD L. DIXON,
Plaintiff Below, Appellee,

v.

OGDEN NEWSPAPERS, INC.,
A CORPORATION,
Defendant Below, Appellant

and

DONALD J. NAEGELE,
Plaintiff Below, Appellee,

v.

OGDEN NEWSPAPERS, INC.,
A CORPORATION,
Defendant Below, Appellant

Appeal from the Circuit Court
of Ohio County
Honorable Ronald E. Wilson, Judge
Civil Action No. 83-C-427R

REVERSED

Submitted: September 11, 1991
Filed: February 27, 1992

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Wheeling, West Virginia
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JUSTICE BORTHERTON delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'[A] public official . . . can sustain an action for libel only if he can prove that: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, (4) the

publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material.' Syllabus Point 1, in part, Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674, 95 A.L.R.3d 622, cert. denied, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed.2d 107 (1975)." Syllabus point 4, Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778 (1986).

2. "Under New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1969), whenever there is a First Amendment defense to actions under state law, the state court is required to be a judge of both the facts and the law . . . ." Syllabus point 2, in part, Mauck v. City of Martinsburg, 167 W.Va. 332, 280 S.E.2d 216 (1991).

3. "A court must decide initially whether as a matter of law the challenged

statements in a defamation action are capable of a defamatory meaning." Syllabus point 6, Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778 (1986).

4. In order to sustain an action for libel, a public official must present clear and convincing evidence that the media defendant acted with actual malice. Actual malice must be proven with convincing clarity.

5. Evidence that a media defendant intentionally "avoided" the truth in its investigatory techniques or omitted facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel.

Brotherton, Justice:

[Errors are indicated or corrected by bracketed comments of counsel for Dixon and Naegele.]

The plaintiffs, Ronald L. Dixon and

Donald J. Naegele, brought separate libel actions in the Circuit Court of Ohio County, West Virginia, against Ogden Newspapers, Inc., publisher of The Intelligencer, a newspaper with a circulation of approximately 24,000 in the northern panhandle of West Virginia. The two cases were consolidated for purposes of discovery and trial.

The defendant newspaper initially moved for dismissal in accordance with Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Thereafter, the defendant filed a memorandum in support of a summary judgment motion, arguing that the publication of the newspaper articles in question was protected by the common law reporters privilege as a fair and accurate report of an official proceeding. In an opinion and order dated February 28, 1984, the circuit court denied the

defendant's motion and stated that whether the newspaper articles were actually a fair and accurate report of the magistrate court proceedings, and were therefore entitled to the reporter's privilege, was a triable issue of fact precluding summary judgment.

The case eventually proceeded to trial. The court denied defense motions for a directed verdict at the conclusion of the plaintiff's evidence and after all evidence had been presented. On October 31, 1988, a jury awarded each plaintiff $250,000 in compensatory damages and $25,000 in punitive damages. On March 9, 1989, the trial court granted the defendant's motion for judgment notwithstanding the verdict and eliminated the punitive damage awards. Ogden Newspapers, Inc., now appeals to this Court from both the jury verdict and the judg-

ment entered by the court below on November 10, 1988. The newspaper argues that the plaintiffs failed, as a matter of law, to adequately demonstrate either the falsity of the story or that the story was published with the actual malice required by New York Times Co. V. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny. We agree that the constitutional evidentiary requirement was not met in this case, and for the reasons set forth below, we reverse the judgment of the Circuit Court of Ohio County.

The plaintiffs, Dixon and Naegele, were policemen employed by the City of Wheeling when a trial took place in the Magistrate Court of Ohio County in Wheeling, West Virginia, on May 2, 1983. During the course of this trial, the defendant, local businessman George Stefanow,

identified both plaintiffs as police officers with whom he discussed a police vice raid which transpired on July 15, 1982.

Warren Bays, a veteran reported employed by The Intelligencer, was assigned to cover Stefanow's trial, which arose out of Wheeling rookie police officer Robert Heldreth's allegation that Stefanow threatened him over the telephone on July 17, 1982. Stefanow admittedly called Heldreth after he learned that in the course of the aforementioned vice raid, Heldreth used Stefanow's name to gain access to the "Green Door," a suspected house of prostitution located in Wheeling.

At this point, it is important to note that George Stefanow is the brother-in-law of one of the plaintiffs in this case, Donald J. Naegele. He is also an admitted antagonist and outspoken critic

of the leadership of the Wheeling Police Department. The plaintiffs describe Stefanow as a man who was conducting his own war to cleanse the higher ranks of the police department of alleged corruption. Stefanow states that when he learned that his name had been used by Heldreth in the raid, he suspected that Wheeling's Chief of Detectives Joseph S. Davis, Jr., Chief of Police Edward Weith, Jr., and members of Wheeling's vice squad had instructed Heldreth to use his name as a retaliatory measure to foster animosity toward Stefanow among his prospective constituents.[1] At that time of the in-

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[1]Stefanow testified that the day after he learned his name had been used, he approached Chief Weith, who was joined by Detective Davis, and asked them why they would use his name: "Davis informed me we use any ploy we can, anybody's name or any ploy we can to get into a house of prostitution. I said, 'In other words, you condone using my name?' and he said, 'We will use any name,' and I said, 'What if I used your name if I go to rob a bank? Would you like that?'"

cidents which give rise to this action, Stefanow was a condidate for election to the Wheeling City Council.

According to the plaintiffs, Stefanow contacted each of them by telephone several days after the raid. Dixon states that, in response to Stefanow's questioning, he told Stefanow that the name of the police officer who had made the raid on the Green Door was Robert Heldreth. According to Dixon, this information was available to the public, and he gave it out over the phone in his official capacity as a sergeant. Later, in response to a separate phone inquiry, Officer Naegele told Stefanow that he had never heard of Officer Robert Heldreth.

Two days after the July 15, 1982, vice raid, Stefanow contacted Heldreth by telephone. In testimony given at trial on May 2, 1983, Stefanow stated that he

called Heldreth because he wanted to know why Heldreth used his name to gain entrance to the Green Door. Stefanow said he wanted to know who told Heldreth to use his name, "[b]ecause I have lawsuits against [Detective Steve] Habursky and the police force, vice squad people." As a result of the call, Stefanow was subsequently charged with and tried for the alleged offense of telephone harassment.

Following Stefanow's trial on May 2, 1983, Warren Bays' report of the proceedings appeared in two separate news stories in the May 3, 1983, edition of The Intelligencer, which is a morning newspaper. One article appeared on page one with the headline "Stefanow: Policeman Supplied Information," and a lead paragraph which stated that "Wheeling tavern owner George Stefanow testified Monday that his broth-

er-in-law, Patrolman Donald Naegele, and Sgt. Ronald Dixon of the Wheeling Bureau of Police supplied Stefanow information about a vice raid last summer." A second, lengthier article, entitled "Stefanow Found Innocent in Phone Threat" was on page eleven, which was the first page of the second or city section. These two news stories formed the basis for the libel actions filed by police officers Dixon and Naegele, who alleged that the newspaper was guilty of libel by innuendo which damaged their reputations.[2]

The plaintiffs concede that both of the articles written by Bays were substantially accurate and true "as far as

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[2] See Note, The Art of Insinuation: Defamation by Implication, 58 Fordham L. Rev. 677, 679 n.14 (1990). The author states that courts "use the terms implication, innuendo, and impression interchangeably." However, the commonly understood meaning of innuendo is "the implication arising from a literal statement." Id.

they went." However, they maintain that material facts were omitted and, as a result, their reputations were damaged by the innuendo and the inferences that readers may draw from the two articles. The plaintiffs contend that the articles imply that they each gave Stefanow information concerning the July 15, 1982, police vice raid on the Green Door in advance of the raid, and thus interfered with the raid in some undisclosed manner. The plaintiffs further allege that Warren Bays intentionally designed the story so as to permit these inferences, in furtherance of a conspiracy between Bays and police Lt. Joseph Davis to damage the reputations of Officers Dixon and Naegele.

Elaborating on their argument, the plaintiffs maintain that Stefanow's trial testimony was quite clear with respect to both the mundane nature of his discussions

-with Dixon and Naegele and to the post-raid time frame, but that Bays nevertheless "transformed" Stefanow's truthful and nondefamatory testimony into false and defamatory news accounts of that testimony. The plaintiffs argue that they successfully proved at trial that Bays made this so-called transformation knowingly, intentionally, and maliciously, as a favor to his long-time friends, Lt. Davis and Chief Weith, who were political adversaries of Stefanow and viewed Dixon and Naegele as two of Stefanow's strongest supporters within the police department.

In its defense, the newspaper offers that the contents of the two stories were true and accurate. Bays testified that he did not have access to a transcript of the trial proceedings, but he constructed what he believed to be a fair summary

of what occurred at Stefanow's trial from his notes. The newspaper submits that when the context [sic] of an article is substantially true, innuendo alone is insufficient to support a public official's claim of libel. Further, because First Amendment defenses are involved, a trial court must make an independent determination of whether an article is capable of a defamatory connotation and whether the evidence presented satisfies the constitutional standards by proving actual malice with "convincing clarity."

Both parties to this case stipulated to the plaintiffs' designation as "public officials."[3] In syllabus point 4 of

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[3]"Police and other law enforcement personnel are almost always classified as public officials. It is hard to conceive of speech more vital to a free and democratic society than speech concerning public officials, for the police are the embodiment of the government's maintenance

Long v. Egnor, 176 W.Va. 628, 346 S.E. 2d 778 (1986), this Court stated that:

> "[A] public official . . . can sustain an action for libel only if he can prove that: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame and plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material." Syllabus Point 1, in part, Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674, 95 A.L.R.3d 622, cert. denied, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed.2d 107 (1975).

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of social order." R. Smolla, Law of Defamation § 2.26[1] (1991); see Starr v. Beckley Newspapers Corp., 157 W.Va. 447, 201 S.E.2d 911 (1974), in which this Court held that "[a] municipal police sergeant is a 'public official' within the contemplation of the New York Times Co. v. Sullivan case and must, therefore, allege and prove actual malice in order to recover in a libel action against a newspaper." Id. at syl. pt. 1.

Before we examine the evidence which was presented in this case, we will briefly address the appropriate standard of review. In Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674, 681 (1975), this Court stated that "[u]nder the mandate of New York Times v. Sullivan, supra, it is incumbent upon an appellate court in determining the validity of a libel judgment both to consider the law and to make an independent evaluation of the evidence to insure First Amendment protection to publishers." "[W]here First Amendment rights are implicated, courts have applied a stricter standard in judging the sufficiency of a complaint." Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778, 782 (1986). In syllabus point 2 of Mauck v. City of Martinsburg, 167 W.Va. 332, 280 S.E.2d 216 (1981), we stated that as a result of New York Times

v. Sullivan, "whenever there is a First Amendment defense to actions under state law, the state court is required to be a judge of both the facts and the law. . . ."

The standard of review that an appellate court must apply to a libel case was refined by the United States Supreme Court in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511, 104 S.Ct. 1949, 1965, 80 L.Ed.2d 502, 523, (1984), wherein the high Court explained:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any jdugment that is not supported by clear and convincing proof of "actual malice."

"A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning." Syllabus point 6, Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778 (1986).

In the case now before us, the trial court denied the newspaper's motion for summary judgment on February 28, 1984, stating that the facts did not warrant summary judgment because the fairness and accuracy of the newspaper articles were issues to be determined by a jury. Therefore, we must determine first whether Bays' articles were capable of a defamatory meaning, and, if so, whether the judgment entered for the plaintiffs was supported by clear and convincing proof of actual malice.

The appellant argues that the articles written by Bays, together with any innuendo that could reasonably flow from

their omission of the fact that the vice raid information was not communicated to George Stefanow until after the raid, are not defamatory as a matter of law and the trial court erred in failing to make this preliminary finding. We agree.

The plaintiffs' evidence of actual malice consisted primarily of alleged conspiratorial ties between Intelligencer reporter Warren Bays and the Wheeling Police Department. Bays and Chief of Detectives Joseph Davis were admittedly personal friends. Bernard "Sonny" Watson, who was an employee of George Stefanow, testified that when Bays and Davis were leaving the courtroom after Stefanow's trial, Davis said something to the effect of "get those m-f-'s" and that Bays then nodded and winked [grinned] in response.

The plaintiffs also cited Bays' two

May 3, 1983 newspaper articles as further evidence in support of their conspiracy theory. They argue that both articles contained exaggerated, distorted, and misleading renditions of the substance of Stefanow's testimony. They maintain further that the published accounts were enhanced by suggestive comments portraying the plaintiffs as "informants" and "sources" who "leaked" sensitive police information in an attempt to frustrate a vice raid and who had probably "leaked" sensitive police information to outsiders to frustrate other covert police operations on other occasions.

More specifically, the plaintiffs state that a comparison of Stefanow's trial transcript with the inside news article written by Bays "reveals . . . that the two quotations were fabricated. Each fabricated quotation was instrumental in misleading readers . . . ." The quo-

tations the plaintiffs refer to are the use of the word "sources" to describe Dixon and Naegele and a statement attributed to Stefanow that he "had been alerted" about Heldreth. The plaintiffs claim that the word "sources" implied that Stefanow had an ongoing relationship with Dixon and Naegele. Further, they argue that by stating that Stefanow "had been alerted" about Heldreth, the article "implies that the identity of Heldreth as an undercover officer had been imparted by Dixon and Naegele to Stefanow in advance of the raid."

The plaintiffs also object to a sentence in the article in which Bays wrote that "In answer to a question . . . Stefanow said he'sometimes asks' the two police officers questions 'and they give me information.'" A review of the transcript reveals that in response to the

prosecutor's question about whether he discussed "other events that occur in your neighborhood with these police officers?", Stefanow responded, "Yes, because that is my neighborhood." Shortly thereafter, Stefanow was again asked, "You ask them and do they tell you what is going on?" He replied, "Sometimes."

The portion of the newspaper article which contains the specific quotations objected to by the plaintiffs states as follows:

> Under questioning by Ohio County Assistant Prosecutor A. Dana Kahle, Stefanow identified his informants on the police force as "my brother-in-law Don Naegele and Sgt. (Ronald) Dixon."
>
> Stefanow had at first refused to identify his "sources" on the police force "because it might incriminate the officers," but after consulting with his attorney, William Metzner, he agreed to testify about information given him concerning the vice raid in Center Wheeling.
>
> "I discussed it with Don Naegele and Sgt. Dixon," Stefanow

> said. In answer to a question from Kahle, Stefanow said he "sometimes asks" the two police officers questions "and they give me information."
>
> However, there was no testimony as to exactly what was discussed between Stefanow and the police officers. Stefanow said it was common knowledge that a "rookie" is used on vice raids and that he had "obtained information" about Heldreth before he had ever met the new policeman.
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> "Police officers told me he had only been on the force for two days," Stefanow told the court. He further said "I had been alerted" about Heldreth. (Emphasis added.)

The transcript of Stefanow's testimony at his May 2, 1982, trial confirms that Stefanow never actually stated that he "had been alerted" about Officer Heldreth. However, Stefanow did state that when he tried to obtain information about Heldreth, he learned that Heldreth was a rookie who had only been on the force two days. Stefanow did not testify that he got information only from the

plaintiffs. In fact, in the next paragraph of the article quoted above, Bays reported that "He [Stefanow] identified Lucille Riggi, who has been cited by police for operating an alleged house of prostitution, as one person having given him information on the new officer and the vice raid." Most importantly, nothing in either of the two news articles suggested that the vice raid was compromised in any manner because of the information Stefanow received from the plaintiffs.

Although it is evident from the transcript that Stefanow never used the words "sources" or "informants" to describe the plaintiffs, the article accurately reported Stefanow's reluctance to respond when questioned about who "informed" him of the raid. When asked, "Would you tell us the names of those police officers that gave you information?", Stefanow replied, "I will not be-

cause it would tend to incriminate them." When considered within this context, Bays' use of the words "sources" or "informants"[4] was not inappropriate, and it certainly could not be characterized as a "knowing falsehood."[5]

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[4]The defendant refutes the plaintiffs' suggestion that the use of the term "informant" is in a context leading an individual "to believe that he supplied confidential police information to Stefanow to which Stefanow had no right." The plaintiffs [defendant] point out that Stefanow was responding to the assistant prosecuting attorney's request that he name the police officers "that informed you of the raid." The plaintiffs [defendant] offer the following definitions to support their argument:

> An INFORMANT is one who gives information of whatever sort; an INFORMER is one who informs against another by way of accusation or complaint. INFORMER is often, INFORMANT never, a term of opprobrium.

Webster's New International Dictionary, Second Edition, Unabridged (1950 Ed.).

[5]In Masson v. New Yorker Magazine, Inc., 501 U.S. ___, 111 S.Ct. 2419, 115 L.Ed.2d 447, 472 (1991), the United States

With regard to the precise time of the vice raid information disclosure, Stefanow testified that Dixon and Naegele gave him information after the raid. In denying Ogden Newspapers' motion for summary judgment on February 28, 1984, Circuit Court Judge Ronald Wilson wrote than [that], "[t]he testimony was quite clear that the information given to Mr. Stefanow was given sometime after the Wheeling police raid on a suspected house of prostitution. That acute information is nowhere to be found in either article." Judge Wilson concluded by asking, "[w]ith-

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Supreme Court addressed the issue of whether actual malice is demonstrated through the publication of a quotation with the full knowledge that the quotation does not contain the exact words used by a public figure. The Court rejected this strict standard, with Justice Kennedy writing that, "[i]f an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation."

out that information can it be found that as a matter of law the article accurately reported the judicial proceeding?"

On this point, reporter Warren Bays testified that the whole day in court was confusing. When he was questioned about exactly when Dixon and Naegele gave Stefanow information about the raid, Bays stated, "I think it was unclear to an awful lot of people."[6] Bays also testified that it was "absurd" to charge that he purposely omitted the time of the information transfer. He pointed out that his articles did not state that the information was given out either prior to or after the raid.

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[6]We note that in a separate May 3, 1983, article describing the events at Stefanow's trial which appeared in another Wheeling newspaper, The News-Register, under the headline "'Keystone Kops' Delay Testimony," staff writer Andy Wessels did not include the precise time that Naegele and Dixon offered Stefanow

We believe it is necessary to emphasize that the implication that the plaintiffs were engaged in wrongdoing was not raised first by Bays' omission of the time frame information in his articles, but by Stefanow's testimony, in which he related his fear of "incriminating" the officers. This exchange between Stefanow and the prosecution was reported with substantial accuracy in Bays' article. Bays also wrote that, "[t]here was no testimony as to exactly what was discussed between

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information. In the fourth paragraph of this article, Wessels wrote that Police Chief Weith "promised to investigate testimony by the defendant, George Stefanow, which revealed that Patrolman Donald Naegele and Sgt. Ronald L. Dixon offered him information about a vice raid on an alleged house of prostitution at 2126 1/2 Main St. on July 15, 1982." [This article was never introduced into evidence. Moreover, it was copied from The Intelligencer, a morning newspaper, by the Wheeling News-Register, an evening newspaper. Both newspapers are owned by Ogden Newspapers, Inc., operate from the same building, and share news reported in each newspaper. Bays was the only member of the news media who covered Stefanow's trial.]

Stefanow and the police officers." It is important to note as well that in his article, Bays included Police Chief Weith's comment that Stefanow's testimony in and of itself was not indicative of wrongdoing. Weith stated that he would "study the testimony given" to determine if "official police business had been leaked out." This is the sole reference to a "leak" of any sort in either of Bays' May 3, 1983, articles, and it is consistent with two earlier articles written by Bays which were published in The Intelligencer on March 12, 1983, and March 16, 1983, with headlines which stated "Rift in Police Ranks Appears to Widen" and "Weith Faults 'Outside Influence.'"

In the March 12, 1983, article, Bays reported how divisions within the police department were growing wider after the March 11, 1983, assault hearings in which one of the plaintiffs herein, Ronald Dixon,

was a key figure. Bays wrote that, "[t]estimony also brought out that Dixon had once been in charge of the detective division which is now headed by Lt. Davis. Dixon said he lost the job as chief detective 'the day Ed Weith became chief.'"

However, neither Dixon nor Naegele were mentioned in the March 16, 1983, Intelligencer article in which Bays reported Chief Weith's charges that "outside influences" were tampering with certain police officers and that "'only about six or so' officers are 'disgruntled enough' to cause dissension in the ranks." It was apparently no secret that George Stefanow was the "outside influence" Weith referred to, because his allegations of police corruption were well-known. The March 16, 1983 article also reported Weith's concern that some police department information was being "leaked" to outsiders: "We've sent new men out on

undercover work, and on assigned raids, and their identity has been known by the time they left the building . . . We can't keep the identity of a new officer secret. Their description is given to certain people . . . ."

We reiterate that these two articles written by Bays appeared in The Intelligencer approximately six weeks prior to the magistrate court trial at which George Stefanow was asked to identify the police officers who provided him with information about a raid. He responded to this inquiry by stating, "I will not because it would tend to incriminate them." The subsequent May 3, 1983, articles did not describe the plaintiffs as police officers who were responsible for any leaks of information in advance of police activities, not [nor] did the articles suggest that the police officers had attempted to "frustrate" the vice raid by

providing Stefanow with information. In fact, Chief Weith's own statement, which was quoted twice by Bays, made it quite clear that neither officer had been accused of any type of wrongdoing in connection with a disclosure of information to Stefanow.

Our analysis in this case is complicated to a degree by the fact that the newspaper articles at issue hurl no outright accusations of wrongdoing by the plaintiffs, nor do they express any opinion as to the plaintiffs' conduct. Instead, it is from the omission of one fact that the plaintiffs derive their allegation that the newspaper intended to defame them through the inferences readers may draw from the statement that the plaintiffs supplied Stefanow with information. However, Stefanow's testimony was clear on this point: the plaintiffs did provide him with information when he

requested it on at least one occasion. Whether the plaintiffs were wrong to do so, and whether there were other disclosures, were matters left to further investigation, and the articles make this clear. The newspaper did not draw any conclusions about what the plaintiffs did or did not do.

Evidence that a media defendant intentionally "avoided" the truth in its investigatory techniques or omitted facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel. In this instance, this Court is convinced that the judgment for the plaintiffs must be reversed unless the newspaper intentionally omitted the time of the vice raid information disclosure in order to leave readers with the impression that the plaintiffs wrongfully supplied Stefanow with information. Evidence of

such behavior would support the conclusion that the newspaper published the article with knowledge that it was "false or misleading" or with a reckless and willful disregard of the truth. However, this is unquestionably a difficult thing to prove with "convincing clarity," and we do not believe it was done by the conspiracy theory advanced by the plaintiffs in this case. The newspaper persuasively points out that if there is a "sting" in its articles, it is found not in the fact that Stefanow received information about the vice raid either before or after the raid, but in the fact that Stefanow received any information at all from these police officers at any time. Such an assertion is bolstered by Stefanow's reluctance at his trial to reveal the names of the police officers for fear of "incriminating" them, as well

as by the newspaper's report nearly two months earlier of Chief Weith's concern that police department information was being leaked to outsiders.

Thus, after reviewing both the transcripts of the proceedings below and the contents of the two newspaper articles written by Warren Bays, we conclude that the plaintiffs did not present the clear and convincing evidence of actual malice that public officials are required to show in order to sustain an action for libel. Actual malice must be proven with convincing clarity, and the plaintiffs in this case simply did not offer sufficient evidence to meet this standard.

For the foregoing reasons, the judgment of the Circuit Court of Ohio County is reversed.

Reversed.

NO. 19425

IN THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

[caption omitted]

APPELLEES' PETITION FOR REHEARING

Now come the appellees, Ronald L. Dixon and Donald J. Naegele, by counsel, and respectfully petition this Court for rehearing and reconsideration of the appeal granted herein on December 5, 1989, and decided adversely to Dixon and Naegele by written opinion of this Court filed on February 27, 1992. In support of this Petition, Dixon and Naegele, by counsel, say that, in their opinion, this Court has misapprehended and overlooked points of law and points of fact in reversing the judgment of the Circuit Court of Ohio County which awarded to each appellee,

upon jury verdicts in their favor, compensatory damages of $250,000.00. The points which the appellees believe have been misapprehended and overlooked are treated below.

I.

ARTICLES CAPABLE OF DEFAMATORY INNUENDO

This Court, after reiterating the broad statement in Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778 (1986), that first-amendment considerations require a court to "decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning," (a) incorrectly concluded that the trial judge in the case at bar failed to make any such decision and (b) incorrectly concluded that the articles and any innuendo reasonably flowing from them were not defamatory as a matter of law.

A. Trial Court Did Rule on Capability of Defamatory Innuendo

As recited in the appellees' brief on appeal, The Ogden Newspapers, Inc., moved to dismiss the complaints of Dixon and Naegele on the grounds, among others, that Ogden "did not publish any libelous or defamatory matter pertaining to . . ." Dixon and Naegele, and that the "language" of the published articles "does not constitute . . . a libel nor is it . . . defamatory." (R. 20-21, 25-26.)

After quoting the statement (R. 97) in each of Ogden's supporting memoranda that "[h]ad the articles . . . asserted or implied wrongdoing or failed to describe the context of the statements or identify the declarant, plaintiff might be heard to complain of defamation," the trial court, treating the dismissal motions as motions for summary judgment, not only stated the conspicuous omission of

the post-raid time from the reported substance of Stefanow's 1983 trial testimony created jury questions as to the fairness and accuracy of the newspaper's report of Stefanow's trial and that "[t]he facts in this case do not warrant the application of summary judgment," but also denied the motions outright. The rejected motions included the assertion that the published material was not defamatory, so it appears rather obvious that the trial court considered reporter Warren Bays' omission of the post-raid time frame as being capable of misleading readers to a defamatory conclusion.

B. This Court Wrongly Decided Capability Issue

This Court, in its opinion, declared that it "must determine first whether Bays' articles were capable of a defamatory meaning . . ." because the trial court had not done so. After noting that

Ogden argued that the articles written by Bays, together with any innuendo reasonably flowing from the omission by Bays of the post-raid time frame, "are not defamatory as a matter of law and the trial court erred in failing to make this preliminary finding," this Court tritely concluded, "We agree." This Court then quickly changed the topic to the issue of actual malice, which it pursued relentlessly, but unpersuasively, for the remainder of its written opinion.

While there is some debate about whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence, Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678, 2683 n.2 (1989), no question exists about the standard of proof required to establish published material as defamatory. A plaintiff must prove that the

material is defamatory by a preponderance of the evidence. It is only where the type of speech cannot reasonably be interpreted as stating or implying actual defamatory facts about an individual does the first amendment come into play to bar a recovery. Milkovich v. Lorain Journal Co., 110 S.Ct. 2695, 2704 (1990); cf. Long v. Egnor, supra, 346 S.E.2d at 784. In Milkovich, the United States Supreme Court declined to recognize "a wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich, supra at 2705. Instead, the United States Supreme Court held that where a statement "on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials . . . ," the statement is actionable regardless of whether the statement is one of opinion or one of fact. Id. at 2706-07. (Emphasis added.)

In Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419 (1991), the United States Supreme Court reversed a judgment of the United States Court of Appeals for the Ninth Circuit, which had affirmed a federal district court's summary judgment in favor of a news writer. There, the United States Supreme Court considered six published topics from interviews in which the public-figure plaintiff had been misquoted, and concluded that five of the six passages created issues of fact for the jury as to falsity and actual malice. One of the quoted passages (considered by the Supreme Court in its opinion under the headings "He Had the Wrong Man") concerned the omission of part of what the plaintiff had said, but otherwise substantially followed the taped recording of the plaintiff's interview. The Supreme Court concluded that the difference in meaning

created by the omission was "material" and that "a jury might find it defamatory." With respect to the fabricated and altered quotations under review, the Supreme Court observed that "many of the quotations at issue might reasonably be construed to state or imply factual assertions that are both false and defamatory . . . ." (Emphasis added.)

Counsel for Dixon and Naegele submits that the West Virginia Supreme Court of Appeals overlooked and/or misapprehended the ramifications of Milkovich v. Lorain Journal Co., supra, and Masson v. New Yorker Magazine, Inc., supra. An omission from, or an alteration of, the substance of a person's reported statements, particularly when the writer uses quotations, may often result in stated or implied false, defamatory assertions. In the instant case, the dispositive question is whether or not a reasonable fact finder could conclude that the omission of the post-raid tim

frame from Bays' articles and the fabricated quotations implied a false, defamatory meaning. Not only could a reasonable fact finder (a jury) make such a conclusion, but the jury did so in this case.

II.

APPELLATE REVIEW MUST EXCLUDE TESTIMONY OBVIOUSLY DISBELIEVED BY JURY

A. Actual Malice and Credibility

Counsel for Dixon and Naegele submits that Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678 (1989), requires that an appellate court review only the evidence of actual malice which remains after eliminating the testimony of witnesses which the jury, as fact finder, obviously disbelieved, unless the jury was clearly wrong in its credibility determinations.

This Court did not follow the mandated approach outlined in Harte-Hanks,

but instead relied on Bays' testimony that he was confused and transcribed his notes to the best of his ability (although the jury obviously rejected the truth of his sworn drivel) to conclude that the evidence of actual malice was not clear and convincing. Reliance upon Bays' testimony to blur the clarity and weaken the persuasiveness of the evidence of actual malice on the part of Bays is clearly improper under Harte-Hanks and finds no support or justification in the first amendment.

What this Court failed to consider is that the jury might have had good reasons not to believe Bays. Bays' demeanor on the witness chair was atrocious. Whenever Bays answered questions with "Absolutely not," "Certainly not," "That's absurd," or the like, probably everyone in the courtroom, including his own attorney, considered the responses to mean yes.

This was so because Bays frequently smirked, often giggled nervously, and always fidgeted when answering questions that way. Of course, these gestures and mannerisms do not, and cannot, appear in the transcript of Bays' testimony, so that is why Harte-Hanks requires an appellate court to give "special deference" to a jury's obvious credibility determinations.

B. Court's Use of Unadmitted News Article to Lend Credence to Bays' Testimony

What this Court did in footnote 6 to its opinion would, counsel submits, merit a severe reprimand if done by an attorney in a petition or brief filed with this Court. This Court cited a separate article of May 3, 1983, which was published in the Wheeling News-Register, written by "staff writer" Andy Wessels and bearing the headline "'Keystone Kops' Delay Testimony", to lend

credence to Bays' false testimony that the time frame of Stefanow's inquiries of Dixon and Naegele "was unclear to an awful lot of people." Footnote 6, for a variety of sound reasons, is worthless for the purpose intended.

First, the article in the Wheeling News-Register never had been offered into evidence at the trial of this case and, consequently, is not part of the evidence adduced at trial or of the record to be reviewed by this Court. In the second place, Andy Wessels simply copied and paraphrased for the Wheeling News-Register, which is an evening newspaper also owned by Ogden and operating in the same building as The Intelligencer (Transcript, p. 236), a morning newspaper, the articles which had earlier appeared in The Intelligencer. (The fact that Wessels was a "staff writer" and not a reporter constituted a clue of sorts that

Wessels was not present at Stefanow's 1983 misdemeanor trial.) In the third place, Bays was the only representative of any news media who attended Stefanow's 1983 misdemeanor trial. Finally, the time frame to which Stefanow referred repeatedly in his 1983 testimony was crystal clear, unmistakable, and understood throughout the small courtroom (in which no more than twelve observers were present, all of whom were seated).

The News-Register article which was cited by this Court in footnote 6 was proffered by counsel for Dixon and Naegele to counsel for Ogden and to the Court as an exhibit which Dixon and Naegele might possibly offer into evidence. The purpose contemplated by counsel for introducing the article—to show that Bays' news articles of May 3, 1983, had been copied and disseminated by other news media—was instead established by the tes-

timony of witnesses.

III.

ACTUAL MALICE PROVED BY CUMULATION OF FACTS AND CIRCUMSTANCES

In this Court's written opinion of February 27, 1992, this Court methodically attempts to explain away, one by one, each and every fact and circumstance which tend to establish that Bays intentionally omitted the post-raid time frame of Stefanow's brief discussions with Dixon and Naegele. That is not difficult to do if one puts his mind to it. However, Dixon and Naegele's case is built upon a cumulation of facts and circumstances, which, when considered altogether, cannot easily be explained away. For every fact and circumstance (pointing to an intentional misleading of readers) to exist at the same time [by chance] is extremely unlikely.

It is not, as this Court represented,

"the omission of one fact" from which Dixon and Naegele "derive their allegation that the newspaper intended to defame them . . . ." (Opinion, p. 17.) While the omission from the news articles of the clearly expressed post-raid time frame certainly was at the heart of the libel, Bays' state of mind also is reflected by the several fabricated quotations which are mentioned in the appellees' brief and which are considered one at a time in this Court's opinion, and by Bays' "grin" and "nod" in response to Lt. Joseph Davis' angry demand to Bays to "get" Dixon and Naegele when Stefanow was acquitted in his 1983 trial. (As this Court well knows, Sonny Watson did not testify that he witnessed Bays "wink" at Davis.) Furthermore, Bays' failure to seek clarification of Stefanow's supposedly "confusing" testimony, Bays' solicitation of suggestive comments from

the chief of police, Edward Weith, Jr., while Bays supposedly was consciously aware of his confusion, Bays' failure to seek comments from Dixon and Naegele, Bays' close friendships with Lt. Davis and Chief Weith, Bays' awareness of their ongoing political struggle with Stefanow, and Bays' keen awareness of his March 16, 1983, article in which he wrote of Chief Weith's supposed concern about the "leaking" of police business, all bear importantly upon Bays' state of mind at the time he wrote and caused the articles of May 3,1983, to be published in The Intelligencer.

As stated in Harte-Hanks, supra, 109 S.Ct. at 2686, "a plaintiff is entitled to prove a defendant's state of mind through circumstantial evidence . . . ." While it is difficult to prove actual malice in a clear and convincing fashion, Dixon and Naegele are not required to

prove actual malice beyond a reasonable doubt or to an absolute certainty. See Harte-Hanks, supra; Milkovich, supra; Masson, supra. Simply because portions of Bays' news articles of May 3, 1983, contained substantially truthful accounts of Stefanow's 1983 misdemeanor trial does not mean that Bays did not purposely mislead readers. As noted in Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 655 (D.C. Cir. 1966), "the defamer may be [all] the more successful when he baits the hook with truth."

WHEREFORE, the appellees, Dixon and Naegele, respectfully pray that their Petition for Rehearing be granted by this Honorable Court, and that this Honorable Court take such additional action with respect to this Petition and the matters raised herein as it deems appropriate under the circumstances of

this case.

Respectfully submitted,

/s/ William R. Metzner
Attorney for Appellees

IN THE CIRCUIT COURT OF
OHIO COUNTY, WEST VIRGINIA

RONALD L. DIXON,

Plaintiff

vs. CIVIL ACTION NO. 83-C-427-W

OGDEN NEWSPAPERS, INC.,
a corporation,

Defendant

and

DONALD J. NAEGELE,

Plaintiff

vs. CIVIL ACTION NO. 83-C-425-W

OGDEN NEWSPAPERS, INC.,
a corporation,

Defendant

O R D E R

This action came on to be heard upon the defendant's Motions in the Alternative for Judgment Notwithstanding the Verdict, or For a New Trial, and thereupon, upon consideration thereof and after considera-

tion of the argument of counsel, the Court finds and concludes that:

1. The $25,000.00 in punitive damages awarded to each of the plaintiffs is struck as a matter of Federal Constitutional law. The Court finds that the actual damages awarded by the jury is sufficient in this case and "punitive damages may only be recovered in cases where the award of actual damages is insufficient to dissuade others in like circumstances from committing similar acts in the future." Sprouse v. Clay Communications, Inc., W.Va.,211 S.E.2d 674 (1975).

2. The trial court judge has no right to set aside a jury verdict as excessive unless it is "monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous and manifestly show jury passion, partiality, prejudice or corruption." Syllabus, Addair v. Majestic Petroleum Co., W.Va., 232 S.E.2d

821 (1977). The issue is not what the trial judge believes is excessive. If the evidence presented to the jury will support the verdict, a trial judge has no right to substitute his judgment for that of the jury. "The job of determining such intangible and subjective damages as personal humiliation, mental anguish, and indignity has always been the exclusive province of the jury" as long as they are not excessive. Sprouse v. Clay Communication, Inc., W.Va., 211 S.E.2d 674, 693 (1975). The award of $250,000.00 in compensatory damages was not excessive based on the evidence and West Virginia law.

3. The remaining arguments of the defendants have been considered and they do not warrant a new trial or a judgment for the defendant.

Accordingly, it is ORDERED that the

Motions of the Defendant Ogden Newspapers for Judgment Notwithstanding the Verdict and In The Alternative For A New Trial be, and the same hereby are, denied except that the jury award of punitive damages is hereby disallowed.

ENTER this 9th day of March, 1989.

/s/ Ronald Wilson
Ronald E. Wilson, Judge

IN THE CIRCUIT COURT OF
OHIO COUNTY, WEST VIRGINIA

RONALD L. DIXON,

Plaintiff,

v. Civil Action No. 83-C-427-W

THE OGDEN NEWSPAPERS, INC.,
a corporation,

Defendant.

and

DONALD NAEGELE,

Plaintiff,

v. Civil Action No. 83-C-425-W

THE OGDEN NEWSPAPERS, INC.,
a corporation,

Defendant.

MOTION IN ACCORDANCE WITH RULE 50(b) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE AND IN THE ALTERNATIVE MOTION IN ACCORDANCE WITH RULE 59 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE

The defendant, The Ogden Newspapers, Inc., moves the Circuit Court of Ohio County, West Virginia to set aside the verdicts herein and the judgments entered thereon in accordance with the motions of this defendant for a directed verdict, both at the close of the plaintiff's evidence and at the close of all the evidence and to enter judgments for this defendant in accordance with said motions and notwithstanding the verdicts.

Alternatively, the defendant, The Ogden Newspapers, Inc., moves the Circuit Court of Ohio County, West Virginia, to set aside the verdicts and the judgments entered thereon and to grant to this defendant a new trial in each of said civil actions based upon the following grounds:

1. The verdicts, and each of them, are contrary to the law and the evidence.

2. The court erred in denying the defendant's motions for a directed verdict at the close of the plaintiffs' evidence for the reasons stated therein.

3. The court erred in denying the defendant's motions for a directed verdict at the close of all of the evidence for the reasons stated therein.

4. As a matter of law the plaintiffs failed to prove a prima facie case of liable or defamation for each of the plaintiffs were "public figures" as a matter of law.

5. As a matter of law the plaintiffs failed to prove by clear and convincing evidence the requisite malice so as to authorize submission of the issue to the jury in cases filed by "public figures".

6. As a matter of law the plaintiffs failed to prove by preponderance of the

evidence that the publication at issue was false.

7. As a matter of law the plaintiffs failed to prove by preponderance of all the evidence that the publication at issue was other than a fair and accurate report of an official proceeding and that the publication was not subject to the common law "record" or "reporters" privilege.

8. As a matter of law the publication at issue was privileged under the doctrine of "neutral reportage" serving to protect republication of statements involving public officials in matters of public interest.

9. As a matter of law the plaintiffs' claims were barred by the common law defense of "truth".

10. As a matter of law the plaintiffs fail to prove by clear and convincing evidence that the defendant had a

high degree of awareness of probable falsity of the publication or a serious doubt as to the truth of the material published.

11. As a matter of law there was no clear and convincing evidence that the publisher or its agents knew that the statements published and at issue in this case were false or that the publisher, by its agents acted with reckless disregard to the truth or falsity of the statement or statements.

12. There was insufficient evidence of malice so as to authorize the return of punitive damage verdicts.

13. The court erred in submitting the issue of punitive damages to a jury.

14. The verdicts and each of them for compensatory damages are excessive and without evidentiary support demonstrating bias and prejudice on the part of the jury which should be sufficient

to shock the conscience of the court.

15. The court erred in submitting the instructions of the plaintiffs to the jury as part of the charge for the reasons stated upon the record by the defendant.

16. The court erred in failing to give the jury the instructions of the defendant as part of the charge for the reasons stated upon the record.

Dated this 16th day of November, 1988.

/s/ Herbert G. Underwood
Herbert G. Underwood

Union National Center East
P. O. Box 2190
Clarksburg, West Virginia 26301

Attorney for Defendant
The Ogden Newspapers

STEPTOE & JOHNSON
Of Counsel

IN THE CIRCUIT COURT OF
OHIO COUNTY, WEST VIRGINIA

RONALD L. DIXON, Plaintiff,

vs.) CIVIL ACTION NO. 83-C-427-W

THE OGDEN NEWSPAPERS, INC.,
a corporation, Defendant.

and (consolidated)

DONALD J. NAEGELE, Plaintiff,

vs.) CIVIL ACTION NO. 83-C-425-W

THE OGDEN NEWSPAPERS, INC.,
a corporation, Defendant.

J U D G M E N T

On October 26, 1988, these consolidated actions came on for trial before the Court and a jury, the Honorable Ronald E. Wilson presiding; and the issues were duly tried on October 26, 1988, October 27, 1988, and October 31, 1988, and the jury on October 31, 1988, rendered a verdict for the plaintiff Ronald L. Dixon to recover of the defendant, The Ogden Newspapers, Inc., a corporation, compensatory damages in the amount of Two Hundred

Fifty Thousand Dollars ($250,000.00) and punitive damages in the amount of Twenty-Five Thousand Dollars ($25,000.00), and rendered a verdict for the plaintiff Donald J. Naegele to recover of the defendant, The Ogden Newspapers, Inc., a corporation, compensatory damages in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) and punitive damages in the amount of Twenty-Five Thousand Dollars ($25,000.00). Accordingly, the Court does

ADJUDGE and ORDER that the plaintiff Ronald L. Dixon recover of the defendant, The Ogden Newspapers, Inc., a corporation, the sum of Two Hundred Seventy-Five Thousand Dollars ($275,000.00) with interest thereon at the rate of ten percent (10%) per annum from October 31, 1988, until paid, and his costs of action. And the Court does further

ADJUDGE and ORDER that the plaintiff

Donald J. Naegele recover of the defendant, The Ogden Newspapers, Inc., a corporation, the sum of Two Hundred Seventy-Five Thousand Dollars ($275,000.00) with interest thereon at the rate of ten percent (10%) per annum from October 31, 1988, until paid, and his costs of action.

ENTER this 10 day of November, 1988.

/s/ Ronald E. Wilson
Judge

IN THE CIRCUIT COURT OF
OHIO COUNTY, WEST VIRGINIA

DONALD J. NAEGELE,

Plaintiff

v. CIVIL ACTION NO. 83-C-425-W

THE OGDEN NEWSPAPERS, INC.
a corporation,

Defendant

OPINION AND ORDER

Presently before the Court is a motion of the defendant, The Ogden Newspapers, Inc., for summary judgment under Rule 56. In considering the motion, the pivotal issue, in the Court's opinion, is whether the publication in issue was protected by the common law reporter's privilege because it was a fair and accurate report of an official proceeding.

In order to grant the defendant's motion the Court must find as a matter of law that the defendant did not abuse its privilege and that there is no evidence

from which different inferences and conclusions might be reasonably be drawn that the articles did not accurately report the judicial proceedings.

There are two articles in issue. On May 3, 1983, an article entitled "STEFANOW: POLICEMAN SUPPLIED INFORMATION" appeared on page one of the defendant's newspaper. In relevant part the article stated:

"Wheeling tavern owner George Stefanow testified Monday that his brother-in-law, Patrolman Donald Naegle (sic) and Sgt. Ronald Dixon of the Wheeling Bureau of Police supplied Stefanow information about a vice raid last summer." And

"Highlighting testimony was Stefanow, who revealed Naegele and Dixon had offered him information about the vice raid on an alleged house of prostitution at 2126-1/2 Main Street last July 15th.

"Stefanow, however, did not say if the information discussed was official police business.

"Police Chief Edward Weith Monday night said he would 'study the testimony' given to determine if 'official police business had been leaked out'."

In the same newspaper was another article on the same trial and in relevant part it stated as follows:

"Defense testimony presented by Stefanow indicated that he discussed the prostitution raid on the Green Door with at least two police officers, and he testified that both had offered information to him.

"Under questioning by Ohio County Assistant Prosecutor A. Dana Kahle, Stefanow identified his informants on the police force as 'my brother-in-law Don Naegele and Sgt. (Ronald) Dixon'.

"Stefanow had at first refused to identify his 'sources' on the police force 'because it might incriminate the officers,' but after consulting with his attorney, William Metzner, he agreed to testify about information given him concerning the vice raid in Center Wheeling."

"I discussed it with Don Naegele and Sgt. Dixon, Stefanow said. In answer to a question from Kahle, Stefanow said he 'sometimes asks two police officers questions and they give me information'.

"However, there was no testimony as to exactly what was discussed between Stefanow and the police officers. Stefanow said it was common knowledge that a 'rookie' is used on vice raids and that he had 'obtained information' about Heldreth before he ever met the new policeman."

Defendant argues that the reports were

an accurate republication of the statements made in the official proceeding.

"Had the articles, in and of themselves, asserted or implied wrongdoing or failed to describe the context of the statements or identify the declarant, plaintiff might be heard to complain of defamation." Defendant's Memorandum, p. 10.

The actual testimony of George Stefanow at the trial in the Magistrate Court in Ohio County, West Virginia, according to the official transcript was as follows:

"Q. And you testified here that you were upset because he had only been on the force two days and what did he know about law; isn't that correct, sir?

A. Because other police officers told me how long he had been on the police force.

Q. Before you called him other police officers told you that?

A. Oh, yes. I have information from other police officers.

Q. You had information from other police officers between the time the residence of 2126-1/2 Market Street was raided and the 17th day of July, two days, from

other police officers; is that what you are telling us?

A. Yes, I am.

Q. Would you tell us the names of those police officers that gave you that information?

A. I will not because it would tend to incriminate them."

And later on in the testimony -

"Q. Would you tell us the names of police officers that informed you of the raid? Let me put it a little closer in time so there is no misunderstanding. (emphasis supplied). Who informed you of the raid at 2126-1/2 Market Street or Main Street?

A. Uh-huh.

Q. Between the time of the raid and the time you called Officer Heldreth. Tell us the names of those officers.

A. Well, my brother-in-law was one.

Q. Who is that?

A. Patrolman Naegele.

Q. Patrolman Naegele told you of the raid?

A. Yeh. Later."

And later on in the testimony -

"Q. Then, it wasn't police officers that told you; was it?

A. No. Not at that time. But I discussed it later with police officers.

Q. Who were the police officers you discussed it with?

A. My brother-in-law.

Q. What is your brother-in-law's name?

A. Naegele.

Q. What is his first name, sir?

A. Donald Naegele.

Q. Any other police officers?

A. Sgt. Dixon.

Q. Sgt. Dixon. When did you discuss it with Sgt. Dixon?

A. I don't recall the exact date. It was after the raid.

Q. How long after the raid?

A. I have no idea. It might have been a day, two days, three days.

Q. Shortly after the raid? Within a week?

A. Within a week." (emphasis supplied)

The testimony was quite clear that the information given to Mr. Stefanow was given sometime after the Wheeling police raid on a suspected house of prostitution. That acute information is nowhere to be found in either article. Without that information can it be found that as a matter of law the articles accurately reported the judicial proceeding?

The facts in this case do not warrant the application of summary judgment. At least one genuine issue of material fact remains which precludes the granting of summary judgment. That triable issue of fact is whether the article was a fair and accurate report of the proceedings in Magistrate Court and therefore entitled to the reporter's privilege.

ORDER OF COURT

On the 28 day of February, 1984, it

is ORDERED that the Plaintiff's Motion for Summary Judgment is denied.

ENTER this 28 day of February, 1984.

By the Court:

/s/ Ronald Wilson
Judge

IN THE CIRCUIT COURT OF
OHIO COUNTY, WEST VIRGINIA

DONALD J. NAEGELE

Plaintiff,

v. // CIVIL ACTION NO. 83-C-425W

THE OGDEN NEWSPAPERS, INC.,
a corporation,

Defendant.

MOTION IN ACCORDANCE WITH
RULE 12(b)(6) OF THE WEST VIRGINIA
RULES OF CIVIL PROCEDURE ON
BEHALF OF THE DEFENDANT

The defendant The Ogden Newspapers, Inc., moves the Court pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure as follows:

1. To dismiss the action because the complaint fails to state a cause of action against this defendant upon which relief can be granted for, among other reasons, the following:

a. That the matters and facts alleged in the plaintiff's complaint do

not state any such facts as may constitute a cause of action for libel in that it positively and affirmatively appears from the face of the complaint that the defendant did not publish any libelous or defamatory matter pertaining to the plaintiff;

b. That the matters and facts alleged in the plaintiff's complaint do not state any such facts as may constitute a cause of action for libel in that it positively and affirmatively appears from the face of the complaint that the language asserted to have been published by this defendant does not constitute at law a libel nor is it in any matter defamatory;

c. That the matters and facts alleged in the plaintiff's complaint do not anywhere state such facts as may constitute a cause of action for libel in

that the words alleged to have been published by this defendant are, as a matter of law, within the protection of the first amendment to the Constitution of the United States and the Constitution of the State of West Virginia;

d. That the matters and facts alleged in plaintiff's complaint do not anywhere state such facts as may constitute a cause of action for libel in that the words alleged to have been published by this defendant are, as a matter of law, absolutely privileged;

e. That the matters and facts alleged in the plaintiff's complaint do not state any such facts as may constitute a cause of action for libel and that the publication is qualifiedly privileged if accurate and does not constitute a substantial departure from the record of the judicial proceeding;

f. That the matters and facts alleged in the plaintiff's complaint do not anywhere state such facts as may constitute a cause of action for libel in that the words alleged to have been published by this defendant are protected by a constitutional privilege of neutral reportage; and

g. That the matters and facts alleged in plaintiff's complaint do not anywhere state such facts as may constitute a cause of action for libel in that the words alleged to have been published by this defendant are, as a matter of law, protected by constitutional privilege of opinion and fair comment.

Dated this 28th day of June, 1983.

/s/ Herbert G. Underwood
Herbert G. Underwood

/s/ Irene M. Keeley
Irene M. Keeley

Union National Center East
P. O. Box 2190
Clarksburg, WV 26302-2190

Attorneys for Defendant

STEPTOE & JOHNSON

Of Counsel

IN THE MAGISTRATE COURT OF
OHIO COUNTY, WEST VIRGINIA

THE STATE OF WEST VIRGINIA

Plaintiff,

-vs- CASE NO. 82-M-1020

GEORGE STEFANOW

Defendant.

TRANSCRIPT OF PROCEEDINGS

BEFORE JACK B. ROTHBART, MAGISTRATE

TESTIMONY OF GEORGE STEFANOW

MONDAY, MAY 2, 1983

APPEARANCES:

On behalf of the State:

DENNIS NAUM, Prosecutor
BY: A. DANA KAHLE, Assistant
City-County Building
Wheeling, West Virginia 26003

On behalf of the Defendant:

WILLIAM R. METZNER, Esquire
2212 National Road
Wheeling, West Virginia 26003

I N D E X

WITNESS:	EXAMINED BY:	PAGE
GEORGE STEFANOW	Mr. Metzner	3 [A-
	Mr. Kahle	16 [A-
	Mr. Metzner	27 [A-

G E O R G E S T E F A N O W

having been first duly sworn, was examined and testified as follows:

BY MR. METZNER:

Q. Would you state your name please?

A. George Stefanow.

Q. You are the defendant in this case, Mr. Stefanow?

A. Yes, sir.

Q. How old are you?

A. Fifty-nine.

Q. And where do you live?

A. 22 Twenty-first Street.

Q. How long have you lived there?

A. There, approximately four years.

Q. What is your occupation?

A. I am retired, United States Navy

and self employed presently.

Q. And what is the nature of your employment?

A. Novelty shop and a club.

Q. What is the name of that club?

A. Chief's Club.

Q. Where is it located?

A. 2207 Market.

Q. When did you retire from the Navy?

A. I retired in July, 1971.

Q. And how long did you serve in the Navy?

A. Thirty years.

Q. And did you see any combat duty?

A. Three wars, yes, sir, three wars.

Q. And where were you born and reared?

A. I was born in Wheeling, West Virginia.

Q. And where in Wheeling?

A. I was born and raised around Twenty-second and Chapline Street.

Q. So where you are now is your old home area?

A. Yes, sir.

Q. Now, I am going to direct your attention to July 17, 1982, the date that Mr. Robert Heldreth accuses you of making a threatening phone call in an harassing manner and so forth.

A. Yes, sir.

Q. Tell us your side of it.

A. Well, I understood there was a raid was made on a house of prostitution down-- I got a phone call that the raid was made in a place and my name was used.

So, I didn't dwell on it too much at the time. So, this one evening, my wife and a friend of ours was sitting there eating and we was discussing it because they said it was an Officer Heldreth that used my name and I didn't know Heldreth because I never met him before.

And, we were talking about it, because I knew his relation--somebody said his father-in-law was Harold Brieding. I used to work out with weights and work out years ago--raised with Harold's brother, Larry Brieding and I knew Bernie Brieding from working for McCanns Brewery.

So, I didn't know how to spell Heldreth, so I just--we discussed it, my wife and I and I said I don't understand why this guy would use my name like this. She was a little upset about it and I was too.

So, we was talking about it and she suggested, "Why don't you just give him a call and find out what the story is. Maybe somebody put him up to it." So I called Bernie Brieding's home and there was no answer, but I know Bernie. And, I called Larry Brieding. There

was no answer the first time and then I called Harold Brieding, which was his father-in-law.

Q. All right.

A. Then, I didn't get no answer. Then I finally called about ten or fifteen minutes later and I got a call from-- somebody answered the phone at Larry Brieding's home. It was his daughter, Lisa, and I asked her, I told her who I was and I said, "This is George Stefanow." She remembered me.

MR. KAHLE: Your Honor, I object to the statements he might have made to Lisa as being hearsay.

MR. METZNER: Well, statements that other people said to him would be, of course Your Honor. Go ahead. Try to refrain from saying what other people said.

THE COURT: Just what you said-- what the conversation was

about.

A. What I did was ask her the phone number, you know, because I didn't know how to spell Heldreth. I didn't know if it was H-i-l or-- I didn't know the name.

So, I just asked Lisa, I said, "Do you know Heldreth's-- could you give me his phone number because I can't spell his name?" because there's a lot of Heldreths.

Q. Well, did you obtain the phone number?

A. She gave me the phone number.

Q. Then what did you do?

A. After I got the phone number, I dialed the number-- I don't recall the number now.

Q. Where were you at the time?

A. At home. We was sitting at the table. We have a long-- in our kitchen,

we have a long formica top table where we sit in the kitchen. The three of us was sitting there, me, Delores Johnson and my wife.

Q. Who is Delores Johnson?

A. Delores Johnson, she works for me and she is more or less a ward of ours. She eats with us and we take care of her. She is under a doctor's care.

Q. Where does she live or where does she work?

A. She works part-time for me at the Chief's Club.

Q. Then what happened?

A. So, we discussed it. So, I got the number and said I might as well call. I want to find out, because I figured the man didn't know me and using my name in this place when they made this raid down there, somebody-- because I have got lawsuits. I have got lawsuits against me by certain officers on the

police force-- who told him that to gain entrance by using my name because I knew these people for thirty or forty years. I knew the people in this house. The man is crippled. I have known him for over thirty years.

Q. By the man, who are you referring to?

A. Mr. Riggi.

Q. And he has a disease?

A. He has lupus. He has got this Lou Gehrig's Disease, in a wheelchair.

Q. And his wife?

A. Lucille.

Q. And she runs the Green Door; is that correct?

A. Yes, sir. Yes, sir.

Q. Do you have any interest in that?

A. No, sir.

Q. Go ahead from there.

A. So, when I dialed, a woman answered the phone, a girl. Sounded like a

young voice. I didn't know whether it was his wife or daughter or sister or anybody.

So, I said, "This is Mr. Stefanow. Is Mr. Heldreth there?" and she said, "Yes. One moment."

So, he came to the phone and I said, "Heldreth?" and he said-- I can't remember the exact words. And I said, "Heldreth, I want to ask you a question." I said, "You made a raid the other night on the 15th down at the Green Door." and he said, "I don't know what you are talking about." I said, "The raid that you made the other night, you went up there and you used my name and Vince Tedeschi's name up in there. Why would you use-- who told you to use my name?"

What I was trying to find out, who gave him my name to use to gain entrance into this place.

Q. Why?

A. Because I have lawsuits against Habursky and the police force, vice squad people.

MR. KAHLE: Your Honor, I am going to ask that this testimony be stricken and the jury instructed to disregard it. We are concerned here with this particular charge, the reasons, and these are self serving declarations on his part. He is mentioning other litigations that certainly have no place in this particular forum at this time.

MR. METZNER: Your Honor, the State's prosecuting witness brought out the newspaper business long before Mr. Stefanow and we have, I think, a right to explain it.

MR. KAHLE: On cross-examination, not on direct examination.

MR. METZNER: Cross-examination of whom? This is direct of Mr. Stefanow.

MR. KAHLE: That is right. On cross-examination of the State's witness you brought-- the information was brought out.

MR. METZNER: It was brought out first in direct.

MR. KAHLE: I am objecting to any testimony relative to any lawsuits from any other people.

MR. METZNER: Your Honor, Mr. Heldreth is saying that why he feared Mr. Stefanow was something he read in the newspaper and our contention is the only thing he read in the newspaper that would scare him would be civil lawsuits that Mr. Stefanow had filed against two officers.

MR. KAHLE: Your Honor, note my objection to it. I am not-- pardon my phrase, but I don't want to get involved in a witch hunt here. I am concerned with one thing and that is a telephone call that was made on July 17th from this man to this man and whether or not the effects of that phone call put this man in fear. That is the only issue before this court, not something that happened two or three months before with him and the police department or something that happened two or three months afterwards or six months afterwards between these two or anybody else.

I am concerned with the night of July 17. I haven't objected to anything that occurred on the 15th and I have no

objection to that. If he wants to testify as to his associates and friends at another place that might have told him something, that is fine, but to go into a big long harangue about lawsuits and everything else, Your Honor, I think the jury should be instructed to disregard the entire testimony at this state.

MR. METZNER: Two things, Your Honor.

THE COURT: I appreciate your objection. The only thing he is trying to explain is why he called Mr. Heldreth. I don't want it belabored. If he was afraid of that, let's just get that one statement. That is all I am going to allow.

MR. METZNER: Our point would

be that any apprehension Mr. Heldreth feared would have been from being sued for what he did rather than physical harm.

THE COURT: I want the jury to disregard that as argument. He can bring that up in his closing argument, but it is not going to be of entry and I don't want him to answer that. Proceed.

Q. (By Mr. Metzner) Keeping away from the suits and so forth, you thought that somebody put him up to it; is that what you are saying?

A. Yes, sir. Very much so.

Q. And you identified them as who?

MR. KAHLE: Your Honor, I object unless this was a conversation between these two people on July 17th. Now, he is going by the left side of the bush instead of the right side of the bush.

He is trying to do what...

MR. METZNER: I will take the right if you take the left.

MR. KAHLE: If it pleases the court, I wish the court would instruct him to discontinue that line of questioning because it is not relevant to this case.

Now, if we get into that witch hunt, Your Honor, we are going to be here for a week and it doesn't involve any of his lawsuits with anybody else. It doesn't involve any of his antagonism with the police department. It involves a telephone conversation between these two people and that only.

THE COURT: Mr. Metzner?

MR. METZNER: Your Honor, that is a little narrow, I believe. I think we are talking about fear

and reasonable apprehension, bodily harm and motivation. In other words, Mr. Stefanow's intent. All those things, the jury is going to have to decide. I think it is a little wider scope than that one telephone call to indicate why Officer Heldreth is apprehensive and why Mr. Stefanow did call the man, would have a bearing on what the jury believes.

THE COURT: Well, I think I am going to let Mr. Stefanow testify. He has indicated he has had past problems and he was gravely concerned, but I think we'll leave the names out at this time. I will sustain the objection.

Q. (By Mr. Metzner) Go ahead.

A. Your Honor, I don't mean to mention no names. I am trying to pin down moti-

vation here, why I think I...

THE COURT: Let counsel direct his questions to show why he was apprehensive and made the call.

Q. (By Mr. Metzner) Well, let's just go ahead with it. You called and got Heldreth; is that correct?

A. Yes, sir.

Q. What was said?

A. As soon as he-- I found out later it was his wife. I didn't know who she was at first. I addressed myself and I told her who I was because I didn't know whether I was talking to his daughter.

Q. Did you tell her who you were?

A. I told her, I said, "This is Mr. Stefanow. Can I speak to your husband?" That is exactly the way it went. And she said, "Just a moment." That was it. When he came to to the phone, the first thing I asked him, I said, "Heldreth, you

made a raid down there on the 15th down at the Green Door." He said, "I don't know what you are talking about." This was the only answer I got from him. "I don't know what you are talking about."

The second question, I said, "Heldreth, can you tell me who put you up to using my name? Who told you when you made that raid..." He is new on the police force. He has only been on the police force two days he was on the 13th and this was the 15th-- two days on the police force and already he is an expert.

I said, "Who..." He said, "I don't know what you are talking about." I said, "Well, let me tell you something, son, that is bad business. You should never..." boom, I got hung up. He hung up on me.

Q. Did you say anything else to him?

A. After he hung up on me?

Q. Well, no. Before.

A. That was the extent of the conversation.

Q. Did you say, answer yes or no, that you would get him?

A. No, sir. That's not my-- I don't -- Definitely not.

Q. How about something to the effect that you would take care of him?

A. No threats whatsoever, sir. No threats whatsoever.

Q. All right. Did you have occasion to talk to Mr. Heldreth at any time after that?

A. No, sir.

Q. Did you know Mr. Heldreth prior to July 17th?

A. Never knew him. I had never seen him before.

Q. Do you recall him ever coming to Saseen's Restaurant?

A. I don't recall. I eat in Saseen's everyday. I have lunch there everyday. I don't recall ever seeing him at Saseen's Restaurant.

Q. By the way, who is the owner of the Duck Inn?

A. Dave Misencik.

Q. Is there a person by the name of Joey who runs...

A. I never heard of a Joe and I have never been in the Duck Inn in five years.

MR. METZNER: All right. I have nothing further.

THE COURT: Thank you. Mr. Kahle, cross-examination.

E X A M I N A T I O N

BY MR. KAHLE:

Q. Mr. Stefanow, when did you first become aware of the length of time Officer Heldreth had been on the police force?

A. When I checked into it with the Clerk's Office.

Q. Which Clerk did you check into it with?

A. I don't know her name, the one upstairs.

Q. In the City Building?

A. City Building.

Q. Now, you are telling us-- When did you check into that?

A. Oh, it must have been-- it was after the arrest.

Q. After you were arrested by Officer Heldreth?

A. Right.

Q. Or after Officer Heldreth swore out the warrant?

A. It was after that. Yes, sir.

Q. Then, you didn't know, at the time you made the telephone call, that he had only been on the force for two days; is that correct?

A. Well, I didn't know how long he had been on the police force.

Q. But you testified earlier to the jury that you knew that he had only been on the force two days and how did he know so much about police business.

A. I decided this later after I made the phone call.

Q. Oh, then you are telling us what you decided later is what you are testifying to now; is that correct?

A. You are trying to put words in my mouth.

THE COURT: Let's not argue. Just answer the question. Phrase it so he can understand it.

A. Anybody who makes a raid, any of these houses busted, they are usually rookies. I never heard of the man. I wanted to find out who he was because I had never heard of him before. Why would he use my name? Most of them are

rookies. They have been on the police force two days, four days, five days. They use them to make busts in these places, whether it is in bars, houses of prostitution...

Q. Are you offering this as expert opinion, sir?

A. Do what?

Q. Are you offering this as an expert opinion?

A. It is common knowledge.

MR. METZNER: Your Honor, he has answered his questions.

MR. KĀHLE: I asked when he found out Officer Heldreth had only been on the force two days. Now, ...

A. The exact time, I don't know, but I did check it with the Clerk's Office.

Q. It was after you had been arrested; wasn't it?

A. Oh, yes.

Q. And you testified here that you were upset because he had only been on the force two days and what did he know about law; isn't that correct, sir?

A. Because other police officers told me how long he had been on the police force.

Q. Before you called him other police officers told you that?

A. Oh, yes. I have information from other police officers.

Q. You had information from other police officers between the time the residence of 2126½ Market Street was raided and the 17th of July, two days, from other police officers; is that what you are telling us?

A. Yes. I am.

Q. Would you tell us the names of those police officers that gave you that information?

A. I will not because it would tend to incriminate them.

Q. Will, if it would tend to incriminate them...

A. The police officers.

Q. I don't believe you have the privilege...

A. Well, I have that privilege.

MR. METZNER: May I discuss something with Mr. Stefanow?

MR. KAHLE: Would you instruct the witness to answer the question?

MR. METZNER: I don't know why he is talking about incrimination.

THE COURT: Let him confer with counsel.

(Whereupon, Mr. Metzner and Mr. Stefanow confer.)

Q. (By Mr. Kahle) Would you tell us the names of the police officers that in-

formed you of the raid? Let me put it a little closer in time so there is no misunderstanding.

Who informed you of the raid at 2126½ Market Street or Main Street?

A. Uh-huh.

Q. Between the time of the raid and the time you called Officer Heldreth. Tell us the names of those officers.

A. Well, my brother-in-law was one.

Q. Who is that?

A. Patrolman Naegele.

Q. Patrolman Naegele told you of the raid?

A. Yeah. Later.

Q. I am talking about between the 15th, when the raid occurred and the 17th when you called this man. That's the ones you said...

A. No. No. I got the call directly from the people that owned the building.

Q. You got the call directly from the people that owned the building?

A. That is right.

Q. And who owned the building at that time?

A. Mrs. Riggi.

Q. Was the building theirs at that time?

A. I don't know.

Q. Well, didn't you participate in a sale on a land contract of that building to these people?

A. Not hardly. I don't own the building.

Q. Didn't the Stefanow estate own that building?

A. No, sir. You are all wrong. Nick Stefanow, not George Stefanow.

Q. You are not familiar with that at all?

A. No, sir.

Q. You did know that Nick Stefanow owned the building?

A. Yes, sir.

Q. Did Nick Stefanow own the building at the time this happened or was he dead?

A. He was dead.

Q. Was it sold by the estate?

A. It was sold by Mr. Petroplus, the estate, the lawyer.

Q. By the estate?

A. Right.

Q. And do you know to whom it was sold?

MR. METZNER: Your Honor, he is going far afield on this.

THE COURT: Try to limit...

MR. KAHLE: Your Honor, I'm trying to find out who gave him the information relative to the raid and to the fact of the raid as he was advised.

THE COURT: So far, he has stated that he got a call from...

MR. KAHLE: From whom?

THE COURT: This building.

A. I just told you, Mrs. Riggi.

Q. (By Mr. Kahle) Mrs. Riggi told you?

A. Right.

Q. That is Lucille Riggi?

A. Right.

Q. And what time did she call?

A. I don't have no idea what time of the day it was.

Q. Well, was it the next day or was it the night of the raid?

A. It was about the next day.

Q. About the next day. What time about the next day?

A. I have no idea.

Q. Morning? Noon?

A. I don't recall.

Q. Was it the afternoon?

A. That's been a long time ago.

Q. Then, it wasn't police officers that told you; was it?

A. No. Not at that time. But, I discussed it later with police officers.

Q. Who were the police officers you discussed it with?

A. With my brother-in-law.

Q. What is your brother-in-law's name?

A. Naegele.

Q. What's his first name, sir?

A. Donald Naegele.

Q. Any other police officers?

A. Sergeant Dixon.

Q. Sergeant Dixon. When did you discuss it with Sergeant Dixon?

A. I don't recall the exact date. It was after the raid.

Q. How long after the raid?

A. I have no idea. It might have been a day, two days, three days.

Q. Shortly after the raid? Within a week?

A. Within a week.

Q. Let me ask you: Do you discuss the events that occur in your neighborhood with these police officers?

A. Yes, because that is my neighborhood.

Q. They usually advise you of what is going on?

A. They don't advise me. I ask them.

Q. You ask them and do they tell you what is going on?

A. Sometimes.

Q. Sir?

A. Sometimes.

Q. Sometimes they tell you the facts of what occurred during a raid?

A. Not necessarily. I got this information from the people that was raided.

Q. You say Mrs. Riggi called you? Tell me the conversation that you had with Mrs. Riggi about this information that you got?

A. She told me there was a raid that was performed down there and that my name was used, mine and another gentleman's name was used.

Q. Did she hear your name being used?

A. Well, she evidently got that from...

Q. Did she tell you she heard your name being used?

MR. METZNER: Calling for hearsay, Your Honor. It is all speculation where she got it.

THE COURT: We won't go into hearsay.

Q. (By Mr. Kahle) Then, you're basing what you did, your telephone conversation, on the conversation you received from a person who has been con-

victed of operating a house of prostitution?

MR. METZNER: I will object.

Q. (By Mr. Kahle) Who has been convicted of using a house for purposes of prostitution.

A. Let me go as far as...

MR. METZNER: I object. I am objecting Your Honor, on the grounds that any convictions, if any, are not a matter of record.

MR. KAHLE: I believe they are a matter of record in the Circuit Court of Ohio County, West Virginia.

MR. METZNER: Not in this court. He just told you that she ran a house.

MR. KAHLE: The original convictions were in this court.

MR. METZNER: Your Honor, there is no convictions in evidence

here. She ran a house, he just told you that.

THE COURT: I will leave the record stand. We will disregard the convictions in this court.

Q. (By Mr. Kahle) Then, your sole information was from Lucille Riggi?

A. Now, I would like to add another thing. The next day when I found out about it, okay, when my name was used, when I got the phone call, I went to the City Building and I approached Chief Weith and he called Detective Joe Davis in with him.

I asked Joe Davis why when they made a raid down there, why they would have somebody use my name and Joe Davis informed me we use any ploy we can, anybody's name or any ploy we can to get into a house of prostitution.

I said, "In other words, you condone using my name?" and he said, "We will use any name," and I said, "What if I used your name if I go to rob a bank? Would you like that?"

And all it got-- my answer was from the Chief and Joe Davis was just a smirk and a smile. In other words, they wasn't going to do anything about it. They didn't deny it. They didn't admit it. But, they did not deny it.

Q. Made you a little bit upset; didn't it?

A. Well certainly.

Q. Made you mad; didn't it?

A. No. No. Upset.

Q. Made you upset but didn't make you mad?

A. No. I don't get mad too easily.

Q. You don't get mad. You get even; right?

THE COURT: Now wait. I am going to instruct him not to answer that. That calls for a conclusion, very very definitely.

A. What do you mean by getting even?

Q. (By Mr. Kahle) By calling a police officer and threatening to do him in if he used your name again.

A. You say I did that?

Q. I am asking.

A. I did not threaten this police officer. The conversation lasted about ten, fifteen seconds. That's not my style to threaten anybody, Dana.

Q. Your wife testified that there was quite a bit of conversation, more than just ten or fifteen seconds.

A. We was in amicable conversation, wondering why he would use my name. He don't even know me. I was just trying to find out who put him up to using my name-- was it another one of the detec-

tives' idea to use my name? He didn't know me.

MR. KAHLE: I have no further questions.

THE COURT: Mr. Metzner?

E X A M I N A T I O N

BY MR. METZNER:

Q. You said Delores Johnson was there?

A. Yes, sir.

Q. Was she there at your home throughout the...

A. She was sitting right there at the table having conversation with us.

Q. Throughout the whole conversation, within hearing distance?

A. Yes, sir.

MR. METZNER: I have nothing further.

(Whereupon, George Stefanow's testimony was concluded.)

THE STATE OF WEST VIRGINIA:

COUNTIES OF MARSHALL & OHIO: SS:

C E R T I F I C A T E

I, VICTORIA J. DUDZIK, Notary Public within and for the Counties of Marshall & Ohio, State of West Virginia, duly commissioned and qualified, do hereby certify that the within-named witness was duly sworn as prescribed by law; that the testimony then given by him was by me reduced to Stenotype in the presence of the witness; afterwards reduced to typewriting under my direction, and that the foregoing is a true and correct transcription of the testimony so adduced during the proceedings of the within cause.

I do further certify that this testimony was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel or attorney of either party, or otherwise interested in the event of this action.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my seal of office at Wheeling, West Virginia, on the 1st day of June, 1983.

/s/ Victoria J. Dudzik
VICTORIA J. DUDZIK
Notary Public within and for
the Counties of Marshall & Ohio
State of West Virginia

My Commission Expires:

April 6, 1991

THE INTELLIGENCER
(all editions, front page)
March 12, 1983

RIFT IN POLICE RANKS APPEARS TO WIDEN

By WARREN BAYS
The Intelligencer Staff

A split in the ranks of the Wheeling Bureau of Police appeared to grow wider Friday as the result of nearly nine hours of courtroom controversy over a barroom altercation last November.

At the end of the day, Jeffrey S. Davis had been bound over to the Ohio County grand jury on a felonious assault charge and William S. McCormick had been exonerated of assaulting Davis.

But according to testimony given in the two cases before visiting Magistrates Nat S. Marino of Brooke County and Norman Ferrari of Hancock County, the rift in the Wheeling Bureau of Police has grown wider.

The divisions in the ranks and an arrest of Davis by McCormick years ago were cited as reasons for the altercation at the Cork and Bottle in downtown Wheeling last Nov. 27.

Testimony from Cpl. Louis Walker indicated that the divisions among policemen are growing wider.

"They used to be friends of mine," Walker said of sergeants Ronald Dixon and Robert Mazur, two of the figures involved in the assault hearings featuring charges against McCormick and Davis.

Walker said he and a friend, Carol Pajak, were out on the town with Mr. and Mrs. Dixon, Mr. and Mrs. Mazur and McCormick. After the altercation, in which McCormick was struck in the face with a beer bottle, Walker said he had been expected to testify to something he hadn't seen.

"They put my name down as a witness and I realized they wanted me to testify to something I didn't see," Walker testified. "I made the assumption they thought I'd assist them," he continued in response to a question from Davis' attorney John Turak of Moundsville.

"I realize you've been placed in a delicate position," Turak told Walker.

"I don't know ... we were friends. I assumed they thought I'd testify. I called Sgt. Dixon on the phone and told him I don't want to be called in, that if they call me in court I'd have to say exactly what I saw. I've been placed on the spot," Walker continued.

Under a direct question, Walker said he is "no longer friends" with Dixon and Mazur.

Walker's testimony showed that he had walked past Davis before the altercation began, and saw no problem. Walker went to

the middle part of the main floor bar and ordered food and drinks for himself and Ms. Pajak.

"They stopped and turned his (Davis') way and I walked on by. They stopped and turned around toward Jeff (Davis)," he said. Earlier, McCormick and Dixon had said that Davis had thrown a shoulder into Dixon as he passed by, supposedly instigating the altercation which followed.

Earlier testimony from McCormick showed his attempt to keep Davis from "lunging at and hitting him (Dixon) with a beer bottle."

According to McCormick, he followed Dixon and Walker in walking single file toward the bar area.

(Continued on Page 3)

POLICE DEPARTMENT RIFT APPEARS WIDER

(Continued From Page One)

Walker, his testimony indicated, passed by when Davis is alleged to have "thrown" a shoulder into Dixon and then yelled an obsenity at him.

McCormick testified that he was only trying to keep Davis from attacking Dixon. In so doing, McCormick, who testified to holding a black belt in Karate, grabbed Davis and shoved him against a partition. Testimony from various witnesses indicated McCormick "pinned" him against a wall.

It was during this skirmish that Davis is alleged to have swung his beer bottle, striking McCormick in the face, beneath the right eye, causing a serious cut.

It was for this that Davis was bound over to the April term of the grand jury on the felonious assault charge.

Following this action, a jury was seated to hear the battery charge filed by Davis against McCormick, but it failed

to hear any testimony from Davis.

Acting on the instructions of Turak, Davis took the Fifth Amendment response to 13 questions asked him by the prosecution and the defense.

Davis refused to answer because, as his attorney said, "He doesn't come here willingly" following the early morning case in which Ferrari ordered him held for grand jury action.

Questions asked by McCormick's attorney, Joseph Bonie, included "Were you ever arrested by McCormick on narcotics charges?" to which Davis answered, "I'm sorry sir, I'll have to take the Fifth."

This was the first time during the proceedings that the arrest, or what could be part of Davis' past record, was mentioned. Later, McCormick said he had arrested Davis several years ago. Camilletti told the court that "nothing came of the arrest."

He asked McCormick if he had become angered over the fact that Davis had not been prosecuted and McCormick said "it is normal to lose 50 percent of drug cases."

During McCormick's testimony he had said Davis had indicated that his father, Lt. Joseph S. Davis, would "come down" on him for the altercation at the Cork and Bottle.

Camilletti asked him if this was a concern of his. "I thought his father would use, abuse, his authority on me. The department has done this before," he said.

McCormick had once worked as an "undercover narcotics" policeman under Dixon's orders when he was on the force.

However, McCormick has been dismissed from the force for alleged "dereliction of duty" involving "leaving his post against a direct order from the chief of

police that he not do so."

Testimony also brought out that Dixon had once been in charge of the detective division which is now headed by Lt. Davis. Dixon said he lost the job as chief detective "the day Ed Weith became chief.

In his closing arguments to the jury, McCormick's attorney, Bonie, said the case had been "tampering with something far more involved.

"There has been no misconduct on his father's part brought to my attention. But on the part of his boy, though, is different."

He added that there has been a lot of inference "that could be true."

He reminded the jury that Dixon had testified to "having my own problems" with the police department in that he was given a suspension by Police Chief Weith last year.

However, Dixon testified in Court, "Thanks to you (Bonie, who was Dixon's attorney) the suspension" didn't stand up and was recently overturned by the Police Civil Service Commission, of which McCormick is a member.

Bonie further suggested that the barroom altercation might be "part of a big problem ... a big picture. You can infer ..." he told the jury, "If you think (the altercation) was because of bad blood between the Davis and Dixon family."

Camilletti told the jury, in his final closing arguments, that "nothing ever came of the arrest' of Davis by McCormick on the drug count."

Prior to Davis being bound to a grand jury on a felonious assault charge, testimony had been heard from Dixon and his wife, Karen; Mazur and his wife, Sally; commercial pilot Ronald A.

DelVecchio and Robert Palmer.

Testifving on Davis' behalf in the afternoon was a host of employees of the Cork and Bottle who all testified that McCormick had "pushed and shoved" Davis and had "pinned" Davis against a wall.

The afternoon proceeding ended at 5:33 P.M. when the jury returned a verdict of innocent against McCormick.

The case went to the jury at 5:13 P.M.

The jury trial was the first presided over by Magistrate Marino, who signed a contempt of court warrant against Robert Sadosky Jr. of 217 South Broadway St., Wheeling, for failing to appear for jury duty.

The jury consisted of three men and three women.

The day's proceedings were unusual in that Camilletti, serving as an assistant prosecutor in the Ohio County prosecuting attorney's office, prosecuted Davis

in the morning on the charges filed against him by McCormick; and then prosecuted McCormick in the afternoon on charges filed by Davis.

That procedure is not illegal, Turak said, but is "questionable and unethical, but we didn't question it before the proceeding started."

THE INTELLIGENCER
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WEITH FAULTS 'OUTSIDE INFLUENCE'

By WARREN BAYS
The Intelligencer Staff

"Outside influences" tampering with certain officers of the Wheeling Bureau of Police are responsible for dissension in the ranks, Police Chief Edward Weith Jr. said Tuesday.

"I feel very strongly that we have officers being influenced from the outside," Weith said in response to questions about a split in the ranks of uniformed officers.

Weith, a veteran of 32 years with the department, including nine as chief, said "only about six or so" officers are "disgruntled enough" to cause dissension in the ranks.

The feeling of discontent surfaced again last Friday during a series of

magistrate court hearings on charges involving a former policeman and the son of an officer who is currently on the force.

"There is a very good possibility that pressure is being brought upon the department by outside interests who, I believe, would like to see someone else as police chief. In 32 years here, I've seen pressure brought upon chiefs, and I'll tell you there is no pressure on this chief to open things up or to do anything that isn't right.

"But there are groups," Weith continued, "that have different views and would like to see a different chief of police, and a different city manager. But those pressures are being brought upon certain individuals of this department and not on me."

Weith said he believes he has "stepped on certain toes, outside this depart-

ment, and perhaps from within."

He said he feels certain some police department information has been "leaked" to outsiders.

"We've sent new men out on undercover work, and on assigned raids, and their identity has been known by the time they left the building," Weith said.

"We can't keep the identity of a new officer secret. Their description is given to certain people. That's why we sometimes have to be so secretive about things. That's why, too, gaining a man's loyalty is so important. There's only so much you can keep secret, especially in a city this size," Weith added.

Trying to prove who is responsible for this "is next to impossible," Weith said. "But we have pretty good ideas who has been responsible."

When asked what the outside influences hope to gain Weith said, "For years there

were perhaps as many as 15 houses of prostitution. Today we know of two. Maybe somebody wants more illegal activity."

(Continued on Page 3)

WEITH CITES 'INFLUENCE'

(Continued From Page One)

Wheeling "is a far cry from what it was 20 years ago," Weith added. "We don't have near the problems that we had back them [sic]. We don't have the amount of crime, either. People say go padlock a house. Well, we have. But it takes four years to do this in court, and during the time we're trying to close it, they're making plans to move down the street."

The chief continued, "There will always be those who want more of those activities. There are those on this force who would want to see someone else as chief to have these things run differently. Some people on the outside feel these ac-

tivities would be more open if another man were chief.

"We've stepped on the toes of a lot of people and these people are upset. If someone on the street can influence an officer, he will, if he thinks the final outcome will be to influence the city manager to making a change (by) naming a new chief."

Weith said he is saddened by reports of widespread dissension in the ranks because "I'm really proud of this department. We've got just a few, maybe five or six or seven, who would want changes, and who keep stirring up problems. Why should this entire department have to suffer because of them?

"We don't have major unrest. Go out and talk to our officers and see what they think and how they feel. There are more and more every day who find out who the disgruntled are and why they are that way.

There are those who have been like this for the past 12 years that I know of and I don't see anything that will change them.

"I honestly know it's (police morale) better today than it's been in recent years. You will always have someone who wants to wrestle leadership of the force away from the chief and to take over the chief's job.

"But there can only be one person as chief, even though there are a few who feel they can always do a better job. Some get upset because they are put outside. Some get upset because they can't be off every weekend.

"All I can do is the best scheduling I can with the men available, and then hope for some loyalty. There are some men who may be better suited elsewhere, but because of rank, I'm not allowed to make the moves. Rank comes first, the

commission (Police Civil Service Commission) says so," the police chief added.

The dissension "hasn't hurt the performance of this department. And as far as a man liking or disliking another man during his off hours, well I have no control over that, and want none. I am concerned when I hear about officers not getting along with each other. But my main concern is that they do their job as police officers for this city."

As policemen, "we are human, too," Weith said. "I wish the entire department wasn't judged on what is done by a couple or three. We have our disgruntled just like any business will have 10 percent of its employees unhappy...no matter where they are or what line of work they are in."

Weith said he has "learned a lot while being police chief. I've learned not to be naive. I've learned not to

believe and trust everyone. I've had to discipline some of my friends just like I've had to discipline others. But in everything, I've been fair with every man here, even if he wasn't fair with me."

Weith said the "outside influences" aren't forcing his hand because "I work for the city manager" and "fortunately I'm working for a city manager who can't be influenced by outsiders."

THE INTELLIGENCER
(all editions, front page)
May 3, 1983

STEFANOW: POLICEMEN SUPPLIED INFORMATION

By WARREN BAYS
The Intelligencer Staff

Wheeling tavern owner George Stefanow testified Monday that his brother-in-law, Patrolman Donald Naegele, and Sgt. Ronald Dixon of the Wheeling Bureau of Police supplied Stefanow information about a vice raid last summer.

Before the court trial, two off-duty Wheeling police officers were responsible for serving two subpoenas — one following a foot race — so that Stefanow's misdemeanor trial could proceed uninterrupted in Ohio County Magistrate's Court Monday.

Stefanow had been charged with a telephone threat to Wheeling patrolman Robert Heldreth. After a day-long series of events in magistrate court, a jury

found Stefanow innocent of harassment as charged by Heldreth.

Highlighting testimony was Stefanow, who revealed Naegele and Dixon had offered him information about the vice raid on an alleged house of prostitution at 2126½ Main St. last July 15.

Stefanow, however, did not say if the information discussed was official police business.

Police Chief Edward Weith Monday night said he would "study the testimony" given, to determine if any "official police business had been leaked out."

In the past, Weith has charged that outside influences had been causing a split in the ranks of the police department and that officers discussing "police business" had been creating problems within the ranks.

The chief said Stefanow's testimony Monday does not in itself indicate any

wrongdoing. "We would have to determine exactly what was discussed and see if official police business had been leaked out."

What took place prior to Monday's jury trial proved as interesting as what took place in the courtroom of Magistrate Jack B. Rothbart.

The 9:30 A.M. start of court was delayed at the request of Assistant Prosecutor A. Dana Kahle, who said he wouldn't proceed without an official court reporter.

Also, two subpoenas, one for Wheeling Detective Steve Habursky and the other for Ohio County Magistrate Rose Humway, both called to appear as defense witnesses, hadn't been served.

"We've a serious matter here," Rothbart said. "This is a serious problem because the sheriff's department hasn't adequately served the subpoenas."

Shortly after 10 a.m., Habursky appeared at the magistrate's offices.

(Continued on Page 3)

DATA SOURCE CLAIMED

(Continued From Page One)

Attempts to serve him the subpoena failed when he said "I wasn't served the paper before now and I'm not going to be waiting around."

He left the building and Dixon, who was off duty and had been called to appear on Stefanow's behalf, was soon in hot pursuit. A foot race took place along 14th Street between the two police officers.

Habursky managed to elude Dixon, but returned to the building sometime later and Dixon then served the paper on Habursky. That forced the detective to testify in the matter, which had evolved out of a vice raid on a center Wheeling establishment last July.

Meanwhile, an unserved subpoena remained for Magistrate Humway. Around noon she appeared and was served her subpoena by off-duty Police Sgt. Robert Mazur.

Humway explained, "The way Lt. Marvin Mellott (of the sheriff's department) tried to serve the papers didn't meet the requirements of the code. I didn't forget about the hearing today, I hadn't been served the summons to appear. Then when I walked in here, Mazur came up and said 'Here, Rose,' with the summons."

Rothbart earlier had said he was contemplating contempt of court charges "against someone," because the summons hadn't been served. After both witnesses appeared, Rothbart said "all's well that ends well" and that he didn't think contempt of court charges would be necessary.

Mrs. Humway, however, was upset. Despite the fuss, she wasn't called to

testify.

Habursky said he was upset because he wasn't sure who was going to pay his wages since he had been called to testify on behalf of the defendant in the matter.

A court reporter became available and the trial finally get [sic] under way [sic] at 11 a.m. with jury selection. The jury was seated at 11:20.

Testimony in the case started at 11:30 a.m.

THE INTELLIGENCER
City Edition
May 3, 1983

STEFANOW FOUND INNOCENT IN PHONE THREAT

By WARREN BAYS
The Intelligencer Staff

An Ohio County Magistrate Court jury Monday found Center Wheeling tavern owner George Stefanow innocent of a telephone threat against Wheeling Policeman Robert Heldreth.

The jury of four men and two women deliberated 23 minutes before telling Magistrate Jack B. Rothbart that testimony during the day-long session failed to convince them of harassment as Heldreth had claimed.

The case evolved from a raid on an alleged house of prostitution by Heldreth last July 15. Two days after the raid, Stefanow telephoned Heldreth, at that time a rookie policeman, because he had been told that Heldreth used Stefanow's name to

gain admittance to the house, known as the Green Door, at 2126½ Main St.

Heldreth had claimed that Stefanow used the phrase "I'll get you," or "I'll get even" for using his name. Stefanow claimed he merely called Heldreth "trying to find out who instructed him to use my name."

Heldreth and his wife, Carol, testified that Stefanow's call frightened the police officer, who "feared for my family" because of Stefanow's "reputation as being loud and an aggressive" person.

Heldreth explained that his "fears" came, in part, from newspaper articles detailing lawsuits which Stefanow had filed against members of the Wheeling police force. "Articles about Lt. (Joseph) Davis, Chief (Edward) Weith and (Detective Steve) Habursky and the problems they were having with Stefanow's lawsuits" created fears, he said.

Defense testimony presented by Stefanow indicated that he discussed the prostitution raid on the Green Door with at least two police officers, and he testified that both had offered information to him.

Under questioning by Ohio County Assistant Prosecutor A. Dana Kahle, Stefanow identified his informants on the police force as "my brother-in-law Don Naegele and Sgt. (Ronald) Dixon."

Stefanow had at first refused to identify his "sources" on the police force "because it might incriminate the officers," but after consulting with his attorney, William Metzner, he agreed to testify about information given him concerning the vice raid in Center Wheeling.

"I discussed it with Don Naegele and Sgt. Dixon," Stefanow said. In answer to a question from Kahle, Stefanow said he "sometimes asks" the two police officers

questions "and they give me information."

However, there was no testimony as to exactly what was discussed between Stefanow and the police officers. Stefanow said it was common knowledge that a "rookie" is used on vice raids and that he had "obtained information" about Heldreth before he had ever met the new policeman.

"Police officers told me he had only been on the force for two days," Stefanow told the court. He further said "I had been alerted" about Heldreth.

He identified Lucille Riggi, who has been cited by police for operating an alleged house of prostitution, as one person having given him information on the new officer and the vice raid.

Stefanow said Mrs. Riggi told him that the raid was successful because the rookie policeman gained entrance to the alleged house by using Stefanow's name.

Heldreth said he never used Stefanow's name; Habursky said he never told Heldreth to use Stefanow's name and Lt. Davis said he did not tell anyone to use Stefanow's name.

However, Habursky, who also had been called by Stefanow as a defense witness, testified "I told him (Heldreth) to do whatever he had to do" to get into the Green Door.

Dixon,too, was called as a defense witness and he said Heldreth had called the police station for Habursky and when told Habursky wasn't available he talked with Dixon.

Dixon testified, "He (Heldreth) said 'you know the troubles I'm having. Is he going to bring out things to cause me personal embarrassment?'

"I said if you did something wrong then George will bring it out in court," Dixon said.

Davis, also called by the defense, told the court he had "nothing whatsoever to do with the raid" on the Green Door and that he "never advised" Heldreth in any regard concerning Stefanow.

The last defense witness was Sandra Keller a WTRF-TV news reporter who refused to identify her source of information when asked if Lt. Davis had alerted her of the pending arrest of Stefanow on the telephone threatening charge.

Metzner said he was attempting to show "that the charge is a set-up from the start," and that Mrs. Keller and a television camerman were waiting at magistrate's court for Stefanow to film "a misdemeanor charge ... and TV coverage of a misdemeanor charge is unusual."

Mrs. Keller refused to identify her source of information and Rothbart agreed that she didn't have to. "I was there

as he (Stefanow) was being led to magistrate court," she testified.

During closing arguments to the jury, Kahl [sic] said the panel had heard a "lot of garbage in this game," but that it boiled down to Stefanow's claim he hadn't threatened Heldreth, or the police officer's charge that he had been harassed.

No. 92-283

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1992

RONALD L. DIXON and
DONALD J. NAEGELE,

Petitioners,

v.

OGDEN NEWSPAPER, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the West Virginia Supreme Court of Appeals, in accord with well-settled principles of First Amendment law enunciated by this Court in, inter alia, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, reh'g denied, 467 U.S. 1267 (1984) and Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), correctly reversed the judgment entered by the trial court, on the grounds that the public figure plaintiffs failed to present clear and convincing evidence that the newspaper articles at issue were published with actual malice and that the articles were

incapable of a defamatory meaning, as a matter of law, following a complete and independent appellate review of the factual record as a whole?

2. Whether special and important reasons exist, warranting the exercise of this Court's discretion to grant the writ sought, where the principles of First Amendment law applied by the court below were correctly interpreted and have been well settled by this Court, making such review purely episodic?

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TABLE OF AUTHORITIES

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Dixon v. Ogden Newspapers, Inc.,
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Long v. Egnor, 176 W.Va. 628,
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Mauck v. City of Martinsburg,
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Sprouse v. Clay Communication, Inc.,
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CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at 416 S.E.2d 237. A copy of the opinion also appears in the Appendix ("A") to the Petition for Writ of Certiorari at A-5. The Order of the West Virginia Supreme Court of Appeals denying the Petition for Rehearing appears in the Appendix to the Petition for Writ of Certiorari at A-1.

The Order of the Circuit Court of Ohio County, West Virginia, denying defendant's motions in the alternative for judgment notwithstanding the verdict, or for a new trial, appears in the Appendix beginning at A-59. The opinion and order of the Circuit Court of Ohio County, West Virginia, denying defendant's Motion for Summary Judgment

in the Naegele case appears in the Appendix beginning at A-72. The Judgment Order of the Circuit Court of Ohio County, West Virginia, entered on November 10, 1988, appears in the Appendix beginning at A-69.

STATEMENT OF THE CASE

Respondent Ogden Newspapers, Inc. ("Ogden"),[1] contends that the Statement of the Case set forth in the Petition for Writ of Certiorari is overblown and argumentative, not the concise Statement of the Case required by the Rules of this Court. Therefore, respondent Ogden provides the following succinct and concise Statement of the Case.

---

[1] There is no parent or subsidiary company to be listed per Rule 29.1 of the Rules of United States Supreme Court.

Petitioners Dixon and Naegele were policemen employed by the City of Wheeling when a trial took place in magistrate's court for Ohio County in Wheeling. The proceedings of that trial were observed and reported by Warren Bays, a reporter employed by The Intelligencer and assigned to cover the court system in Ohio County and Wheeling.

The magistrate's court trial arose out of the allegation by another city policemen, Robert Heldreth, that he had been threatened over the telephone by George Stefanow, a Wheeling tavern owner, because of Stefanow's belief that his name had allegedly been used by Officer Heldreth to gain access to the "Green Door," a suspected house of prostitution located in Wheeling.

The testimony of Stefanow at the trial in magistrate's court was reported by a court reporter at the direction of the prosecuting attorney for Ohio County and the reporter's notes were transcribed after the trial and were a part of the record of this case upon appeal to the West Virginia Supreme Court.

At the magistrate court trial, Bays took written notes of the testimony. He did not have available nor access to any electronic recording device at the magistrate's court. Warren Bays transcribed his notes, as a part of his normal duties for The Intelligencer, after the conclusion of the trial in the late afternoon of May 2, 1983, before the deadline for inclusion in the next edition of The Intelligencer, a morning

newspaper. The reports by Bays, which appeared as two separate news stories in The Intelligencer, can be found in the Appendix to Petition for Writ of Certiorari. A-144; A-150.

These two news stories formed the basis for the libel actions filed by Dixon and Naegele, despite the fact there is no question but that the contents of the two stories were true and accurate:

> Q. (Underwood) Everything that appears in the article which was in the second session (sic) and which is headlined 'Stefanow Found Innocent in Phone Threat' is true in the same as what was in the first article; isn't that correct?
>
> A. (Dixon) Insofar as it goes, yes sir. (Transcript of trial court ("Tr.") at 204).

* * *

> Q. (Metzner) when you say the articles are okay as far as they go, what do you mean by that?
>
> A. (Dixon) Well, the articles that I gave - George Stefanow article is true to the extent when he called me in my official capacity as a sergeant on the front desk, I gave him information that was allowed to be given to anyone who tried to obtain that information. And that I did not give him information prior to those raids so as to prevent the raids from taking place. But that's what I felt they were trying to put - were trying to say or at least inferring that I had done and I didn't do that. (Tr. 212).

See also Tr. 186-188, 200-201 (Testimony of Dixon). Naegele's testimony was to the same effect. Tr. 325-326. Stefanow also conceded that the articles about his criminal trial were essentially correct. Tr. 103-107.

In their respective libel actions, Dixon and Naegele each contended that his reputation had been damaged by the only inference that could be drawn by the reader from the stories, to wit: that they each had given information concerning a police raid upon the Green Door to George Stefanow, Naegele's brother-in-law, and that the information was given to Stefanow before the raid took place, indicating official misconduct and interference with the vice raid.

The allegation of libel framed by the pleadings was not that arising from the publication of false facts, misleading headlines or opinion - the issue was that of innuendo or inference which the petitioners claimed was

perforce dictated by the publications, and that the innuendo or inference was molded intentionally and with "actual malice." It was petitioners' contention that Bays had intentionally designed the story to require this innuendo as a consequence of a conspiracy between Bays and Lieutenant Joseph Davis of the Wheeling Police Department to damage the reputation of Officers Dixon and Naegele.

As a consequence of trial in the Circuit Court of Ohio County, Dixon and Naegele were each awarded $250,000 for compensatory damages and $50,000 punitive damages. Post-judgment motions of the defendant led to the elimination of the punitive damage award but left intact compensatory damages of a half-million dollars.

By Order dated February 27, 1992 the West Virginia Supreme Court of Appeals, the court of last resort in the State of West Virginia, reversed the judgment entered for Dixon and Naegele by the Circuit Court of Ohio County on the ground that the petitioners failed to present clear and convincing evidence, as a matter of law, that the newspaper accounts were published with the actual malice required under New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny, and further, that the petitioners failed to establish, as a matter of law, the falsity of the newspaper accounts. In so doing, the West Virginia Supreme Court of Appeals correctly relied upon and applied principles of First Amendment Law

relevant to libel actions filed by public figures which have been stated and reaffirmed by this Court since 1964. The West Virginia Supreme Court correctly reversed on the ground that the judgment entered upon the jury verdict rendered on behalf of the plaintiffs was unsupported, as a matter of law, by clear and convincing evidence of actual malice and further, that the articles were incapable of a defamatory meaning, as a matter of law.

SUMMARY OF ARGUMENT

The petition for writ of certiorari filed by Ronald L. Dixon and Donald J. Naegele should be denied because there are no "special and important reasons" for the granting of said petition. In

reversing the trial court's entry of judgment upon the jury verdict for plaintiffs, the West Virginia Supreme Court of Appeals, the state court of last resort, correctly applied principles of federal constitutional law which have been established and continually reaffirmed by this Court since New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

ARGUMENT

I. THE PETITION PRESENTS NOTHING NOVEL, CONFLICTING, SPECIAL OR IMPORTANT AND THUS, ALTHOUGH JURISDICTION IS PRESENT, THERE ARE NO COMPELLING REASONS FOR THIS COURT TO GRANT THE PETITION.

Pursuant to Rule 10 of the Rules of United States Supreme Court, a writ of certiorari is granted not as a matter of

right but pursuant to the discretion of this Court. As a preliminary matter jurisdiction must be present, pursuant to 28 U.S.C. § 1257:

> (a) Final judgments or decrees rendered by the highest court of State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

It cannot be denied that respondent's First Amendment rights under the federal constitution, exercised pursuant to its circulation of the newspaper, The Intelligencer, have clashed with petitioners' rights under state law to protection from libel. Thus, in this action brought under state libel law, respondent defended by asserting a federal constitutional privilege, thereby invoking the jurisdiction of this Court once final judgment was entered by the highest court of West Virginia on May 13, 1992.

However, "[t]he presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction for the issuance of the writ is discretionary."

Hammerstein v. Superior Court of California, 341 U.S. 491, 492 (1951). A grant of certiorari issues "only when there are special and important reasons therefor." Rule 10, Rules of United States Supreme Court. No such reasons are presented by the petition herein.

> 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 80 L.Ed. 688, 707, 56 S.Ct. 466.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955) (emphasis added).

Moreover, Rule 10 itself sets forth the characteristic circumstances in which the decision of a state court of last resort will most likely be granted review:

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The matter at bar does not fall within any of the characteristically reviewable situations set forth in Rule 10. The federal principles discussed and applied by the West Virginia court in its

decision below have been well settled by this Court, beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny, and the West Virginia court interpreted and applied the principles correctly, duly citing to New York Times Co., supra, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, reh'g denied, 467 U.S. 1267 (1984) and Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), where appropriate.

The instant petition is merely petitioners' attempt to secure an "episodic" review of what they perceive to be an incorrect application of well settled federal constitutional principles to this particular and specific set of facts. Nothing novel, conflicting or

especially important is presented by this petition. Even a cursory review of the decision rendered by the West Virginia court of last resort demonstrates that it undertook an independent appellate review of the evidence presented at trial as required, see Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) and Bose Corp., supra, and as previously, properly interpreted by the West Virginia court in Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674 (1975), cert. denied, 423 U.S. 882, reh'g denied, 423 U.S. 991 (1975), Mauck v. City of Martinsburg, 167 W.Va. 332, 280 S.E.2d 216 (1981), and Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778 (1986), and it determined, as a matter of law, that the public figures failed to present clear

and convincing evidence that the allegedly libelous newspaper articles were published with actual malice. The West Virginia court framed the issues as follows: "[T]herefore, we must determine first whether Bays' articles were capable of a defamatory meaning, and, if so, whether the judgment entered for the plaintiffs was supported by clear and convincing proof of actual malice." Dixon v. Ogden Newspapers, Inc., 416 S.E.2d 237, 241 (W.Va. 1992); A-23. Following a tedious independent review of the evidence presented at trial, the West Virginia court answered both questions in the negative, and properly reversed the judgment.

In determining the appropriate standard for review, the West Virginia

court relied directly upon this Court's decision in Bose Corp., 466 U.S. 485, quoting as follows:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"

Bose Corp., 466 U.S. at 511, quoted in Dixon, 416 S.E.2d at 241; A-22. Following a thorough review of the evidence with the federal standard as its guide, the West Virginia court concluded:

> Thus, after reviewing both the transcript of the proceedings below and the contents of the two newspaper

> articles written by Warren Bays, we conclude that the plaintiffs did not present the clear and convincing evidence of actual malice that public officials are required to show in order to sustain an action for libel. Actual malice must be proven with convincing clarity, and the plaintiffs in this case simply did not offer sufficient evidence to meet this standard.
>
> For the foregoing reasons, the judgment of the Circuit Court of Ohio County is reversed.

Dixon, 416 S.E.2d at 245; A-40.

II. THE WEST VIRGINIA COURT CORRECTLY CONCLUDED THAT THE NEWS ARTICLES WERE INCAPABLE OF A DEFAMATORY MEANING, AS A MATTER OF LAW.

Although the West Virginia court's analysis of defamatory capability is not nor could it be completely separate and distinct from its analysis of actual

malice, it is clear that the West Virginia court correctly interpreted and relied upon applicable federal constitutional law principles. This is manifested by a review of the following portions of the West Virginia decision:

> Although it is evident from the transcript that Stefanow never used the word 'sources' or 'informants' to describe the plaintiffs, the article accurately reported Stefanow's reluctance to respond when questioned about who 'informed' him of the raid. When asked, 'Would you tell us the names of those police officers that gave you information?', Stefanow replied, 'I will not because it would tend to incriminate them.' When considered within this context, Bays' use of the words 'sources' or 'informants' was not inappropriate, and it certainly could be not characterized as a 'knowing falsehood.'

Dixon, 416 S.E.2d at 242-43; A-29-30. In a footnote signaled at the end of this

passage, the West Virginia court explained its justification for that conclusion:

> In Masson v. New Yorker Magazine, Inc., 501 U.S. ____, ____, 111 S.Ct. 2419, 115 L.Ed.2d 447, 472 (1991), the United States Supreme Court addressed the issue of whether actual malice is demonstrated through the publication of a quotation with the full knowledge that the quotation does not contain the exact words used by a public figure. The court rejected this strict standard, with Justice Kennedy writing back, "[i]f an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation."

Id. at 243, fn. 5; A-30-31. The West Virginia court properly applied and cited to applicable federal law in rendering its conclusion that the articles at issue

were not capable of a defamatory meaning, as matter of law.

III. THE COURT BELOW PROPERLY INTERPRETED AND APPLIED THE "ACTUAL MALICE" STANDARD.

Regardless of the level of explicitness with which the West Virginia court rejected Dixon and Naegele's contention that the articles were false and capable of defamatory meaning, the court was quite clear in its finding that the judgment entered on behalf of the plaintiffs was not supported by clear and convincing evidence of actual malice, as that term has been defined by this Court in cases involving alleged defamation of public officials.

The appropriate federal standard, as delineated in Harte-Hanks Communications,

Inc. v. Connaughton, 491 U.S. 657 (1989),

was correctly interpreted and applied:

> The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. Bose Corp. v. Consumers Union of United States, Inc. 466 U.S., at 510-511, 80 L.Ed.2d 502, 104 S.Ct. (1949). This rule is not simply premised on common law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of '"breathing space"' so that protected speech is not discouraged. Gertz, 418 U.S., at 342, 41 L.Ed.2d 789, 94 S.Ct. 2997 (quoting NAACP v. Button, 371 U.S. 415, 433, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); New York Times Co., 376 U.S. at 272, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (same).

Harte-Hanks, 491 U.S. at 685-86.

> In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," Bose, 466 U.S. at 499-500, 80 L.Ed.2d 502, 104 S.Ct. 1949, the reviewing court must "'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect,'" New York Times Co., 376 U.S., at 285, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (quoting Pennekamp v. Florida, 328 U.S. 331, 335, 90 L.Ed. 1295, 66 S.Ct. 1029 (1946)).

Id. at 688-89.

Petitioners incorrectly contend that the West Virginia Supreme Court of Appeals implicitly disregarded the jury's determination of witness credibility by

its reversal, in contravention of the principles enunciated in Harte-Hanks. That is not the case. Instead, the West Virginia court properly recognized the importance of independent appellate review of the evidence where First Amendment privileges are at stake, as opposed to the garden variety tort case:

> In Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674, 681 (1975), this court stated that '[u]nder the mandate of New York Times v. Sullivan, supra, it is incumbent upon an appellate court in determining the validity of a libel judgment both to consider the law and to make an independent evaluation of the evidence to insure First Amendment protection to publishers.' '[W]here First Amendment rights are implicated, courts have applied a stricter standard in judging the sufficiency of a complaint.' Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778, 782 (1986). In Syl. pt. 2 of Mauck v. City of Martinsburg, 167

> W.Va. 332, 280 S.E.2d 216 (1981), we stated that as a result of New York Times v. Sullivan 'whenever there is a First Amendment defense to actions under state law, the state court is required to be a judge of both the facts and the law. . . .'

Dixon, 416 S.E.2d at 241; A-21-22. Nowhere in its opinion did the West Virginia court challenge the credibility of any of the witnesses but rather, it questioned the sufficiency of the evidence presented by petitioners.

The West Virginia court tediously "examine[d] for [itself] the [articles] in issue and the circumstances under which they were [printed and determined that] they are of a character which the principles of the First Amendment . . . protect." See Harte-Hanks, 491 U.S. at 688. This was premised upon a proper

determination that the plaintiffs did not present sufficient evidence to surpass the "clear and convincing" threshold required before a finding of "actual malice" will be sustained.

The "factual record in full", id., includes not only the oral testimony and evidence which could be drawn therefrom, but also the allegedly libelous newspaper articles. The West Virginia court's review of the content of the articles in the context of the circumstances mandated the conclusion that the articles themselves were substantially true. Therefore, the Court concluded that unless the petitioners had presented clear and convincing evidence of an intentional omission of the timing "of the vice raid information disclosure in

order to leave readers with the impression that the [petitioners] wrongfully supplied Stefanow with information," Dixon, 416 S.E.2d at 244; A-38, the judgment below would have to be reversed. The court noted that petitioners asserted a "conspiracy theory" at trial, in support of a finding of actual malice on the part of respondent's reporter:

> The [petitioners'] evidence of actual malice consisted primarily of alleged conspiratorial ties between Intelligencer reporter Warren Bays and the Wheeling Police Department. Bays and Chief of Detectives Joseph Davis were admittedly personal friends. Bernard 'Sonny' Watson, who was an employee of George Stefanow, testified that when Bays and Davis were leaving the courtroom after Stefanow's trial, Davis said something to the effect of 'get those m-f-'s' and that Bays then nodded

> and winked [grinned] in response.
>
> The plaintiffs also cited Bays' two May 3, 1983 newspaper articles as further evidence in support of their conspiracy theory. They argue that both articles contained exaggerated, distorted, and misleading renditions of the substance of Stefanow's testimony.

Id. at 241; A-24-25.

In its independent review, the West Virginia court carefully compared the evidence of the circumstances and the testimony received at the magistrate court trial, to the articles themselves. The court ultimately concluded, inter alia, as follows:

> Evidence that a media defendant intentionally 'avoided' the truth in its investigatory techniques or omitted facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel. In this instance, this Court is

> convinced that the judgment for the plaintiffs must be reversed unless the newspaper intentionally omitted the time of the vice raid information disclosure in order to leave readers with the impression that the plaintiffs wrongfully supplied Stefanow with information. Evidence of such behavior would support the conclusion that the newspaper published the article with knowledge that it was 'false or misleading' or with a reckless and willful disregard of the truth. However, this is unquestionably a difficult thing to prove with 'convincing clarity,' and we do not believe it was done by the conspiracy theory advanced by the plaintiffs in this case.

Id. at 244; A-38-39.

The West Virginia court made no assertions with regard to the "credibility" of the evidence presented in furtherance of the conspiracy theory but simply concluded that the evidence

was insufficient, as a matter of law, to support a finding of actual malice.

Respondent submits that the West Virginia court properly found, upon independent appellate review, failure of petitioners to present the "clear and convincing" evidence necessary to establish that the articles under attack were published with actual malice. Petitioners relied on a scintilla of "conspiracy" evidence, winking and nodding, which is merely colorable and not significantly probative. There was the sole contention that the respondent's reporter nodded and winked when a superior of the petitioners made a derogatory comment about getting them. Such evidence, standing alone, was so lacking in probative value that the West

Virginia court had no choice but to reverse the judgment, as it did by a vote of five to zero.

The West Virginia court's reversal of the trial court's judgment is also consistent with this Court's decision in Time, Inc. v. Pape, 401 U.S. 279, reh'g denied, 401 U.S. 1015 (1971). In Pape, this Court explained the important distinction between a "falsified" news report and an "erroneous" news report for purposes of First Amendment privilege:

> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under New York Times. To permit the malice issue to go to the jury because of the

omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact.

New York Times was premised on a recognition that, as Madison put it, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot's Debates on the Federal Constitution 571 (1876). With respect to errors of fact in reporting events, we said in New York Times: "A rule compelling the critic of official conduct to guarantee truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to . . . 'self-censorship'. Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have

> recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376 U.S., at 279, 11 L.Ed.2d at 706, 95 A.L.R.2d 1412.
>
> These considerations apply with even greater force to the situation where the alleged libel consists in the claimed misinterpretation of the gist of a lengthy government document. Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of "truth" that would not put the publisher virtually at the mercy of the unguided discretion of a jury.

Pape, 401 U.S. at 290-91.

With regard to the magistrate court trial about which the allegedly libelous articles reported, petitioners concede

that "Bays admittedly was (at the least) consciously confused about the post-raid time frame of Stefanow's discussions with Dixon and Naegele and knew that at the time he wrote the news articles of May 3, 1983." Petition for Writ of Certiorari to the Supreme Court at 66. In this regard, the West Virginia court noted:

> . . . reporter Warren Bays testified that the whole day in court was confusing. When he was questioned about exactly when Dixon and Naegele gave Stefanow information about the raid, Bays stated, 'I think it was unclear to an awful lot of people.'[ ] Bays also testified that it was 'absurd' to charge that he purposely omitted the time of the information transfer. He pointed out that his articles did not state that the information was given out either prior to or after the raid.
>
> We believe it is necessary to emphasize that the implication that the plaintiffs

> were engaged in wrongdoing was not raised first by Bays' omission of the time frame information in his articles, but by Stefanow's testimony, in which he related his fear of 'incriminating' the officers. This exchange between Stefanow and the prosecution was reported with substantial accuracy in Bays' article. Bays also wrote that, '[t]here was no testimony as to exactly what was discussed between Stefanow and the police officers.' It is important to note as well that in his article, Bays included Police Chief Weith's comment that Stefanow's testimony in and of itself was not indicative of wrongdoing. Weith stated that he would 'study the testimony given' to determine if 'official police business had been leaked out.'

Dixon, 416 S.E.2d at 243; A-32-34.

In accord with principles of Pape, the West Virginia court correctly found that insufficient "conspiracy" evidence was presented, given the ambiguous tone of Stefanow's testimony, to establish a

jury issue on the question of actual malice and thus, the court's reversal properly rescued respondent's First Amendment rights from the "unguided discretion of a jury." Pape, 401 U.S. at 291.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the West Virginia Supreme Court of Appeals should be denied.

Respectfully submitted this 11th day of September, 1992.

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FILING AND MAILING CERTIFICATE

I hereby certify that on this 11th day of September, 1992, I filed 40 copies of a Brief in Opposition to Petition for Writ of Certiorari with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail, postage prepaid, the required (3) copies to William R. Metzner, 2212 National Road, Wheeling, WV 26003.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

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